P.C. (AC 44321)	:	SUPREME COURT
CRYSTAL HORROCKS, ET AL	:	STATE OF CONNECTICUT
V.	:	
KEEPERS, INC., ET AL	:	NOVEMBER 16, 2022

PETITION FOR CERTIFICATION

Pursuant to Practice Book §84-1, the Defendants petition for certification to appeal the decision of the Appellate Court, Crystal Horrocks, et al v. Keepers, Inc., et al, (AC 44321) officially released November 1, 2022.

I. INTRODUCTION

The Defendant, Keepers, Inc., is a sports bar in Milford, Connecticut that entered into entertainment leases with dancers who do not remove their clothes and must abide by the strict adult ordinance of no contact enacted in Milford. The dancers wanted to be independent contractors that accepted tips for stage dancing and private dancing fees from bar patrons. The dancers testified they averaged approximately $300 - $350 per night in customer payments. The Plaintiffs brought suit claiming that the dancers were employees not independent contractors and were entitled to minimum wages per hour under the Fair Labor Standards Act 29 USC 201 and Connecticut Labor law CGS 31-58. If they prevailed, the Plaintiffs' attorney was entitled to attorney fees.

The entertainment lease the dancers signed contained an arbitration clause and the suit was decided by an Arbitrator. The Arbitrator found the dancers to be employees. The Arbitrator also decided damages. The Arbitrator found the entertainment lease agreement was illegal and therefore void and unenforceable. The Arbitrator disregarded the clauses in

the agreement that required a setoff of the customer fees from wages if a court/arbitrator found the dancers to be employees. The Plaintiffs provided no written documentation of the days or number of hours worked yet the Arbitrator awarded them $113,560 and despite the Plaintiffs having a one-third contingent fee agreement he awarded the Plaintiffs' attorneys $85,000.00.

II. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appellate Court should have reviewed the Arbitrator's decision as to the illegality of the contract because of their plenary review despite the Trial Court not considering the issue in confirming the arbitration award.

2. Whether the lease agreement is against public policy over which the Appellate Court had unlimited review in that the arbitrator violated the Defendants' freedom to contract.

3. Whether the Appellate Court should have severed the entertainment lease according to its terms and credited the Defendants with the entertainment fees paid to the Plaintiffs from any wages owed.

4. Whether there was a manifest disregard of the law in the Arbitrator using estimated average hours worked per week over a two-year period.

III. BRIEF HISTORY OF CASE

The Arbitrator did not rely upon the express unambiguous language of the lease agreement but rather heard parole evidence. (Exhibit B, A007). He also relied upon an adult entertainment club case, Hart v. Rick's Cabaret Intern, Inc., 967 F. supp. 2d 901 (2013) and issued a decision that the Plaintiffs were employees. (Exhibit C, A013). In addition, the Arbitrator issued an Arbitration Damages Award (Exhibit D, A022). In the

decision, the Arbitrator found the entertainment lease was illegal with its inherent purpose to avoid wage and hour requirements.

The Plaintiffs did not have any written records of the days or hours worked for the years April, 2013-April, 2015. The Defendants had written records but the Arbitrator found them to be "inadequate". (Exhibit D, Pg. 13, A034). The Arbitrator also found the Plaintiffs testimony inconsistent with their deposition testimony. He found the claims of the Plaintiffs and Defendants "wildly conflicting and not subject to reconciliation." (Exhibit D, Pg. 14, A035). He calculated the Plaintiffs' "average hours per week" at minimum wage. (Exhibit D, Pgs. 15-19, A036-A040). The Plaintiffs were awarded $113,560 without any setoff of the payments they received from the customers each night as per the lease agreement because it was unenforceable.

The Plaintiffs filed a Motion to Confirm the Award and the Defendants filed a Motion to Vacate the Award. The Trial Court issued a decision granting the application to confirm the award (Exhibit E, A042).

The Plaintiffs appealed the decision to the Appellate Court and briefed the issue of illegality of contract. The Court relied upon Practice Book §60-5 in not deciding the issue of illegality because it was not raised "at the trial".

The Appellate Court did not find there was a manifest disregard of the law in calculating the damages based on the Plaintiffs estimates of the average number of days and hours they worked a week for a two-year period. The Appellate Court did not consider whether the award violated a legitimate public policy of freedom to contract and failure to sever the enforceable and unenforceable terms including the credit against wages. The

Appellate Court stated it was not raised before the Trial Court citing, Board of Education v. CHRO, 212 Conn. App. 578 (2022).

IV. ARGUMENT

The Defendants request certification by the Supreme Court on petition pursuant to Practice Book §84-1. The Defendants suggest an important reason pursuant to Practice Book §84-2 is that the Appellate Court has failed to decide a question in a way probably not in accord with applicable decisions of the Supreme Court and United States Supreme Court.

A. The Appellate Court should have reviewed whether the lease agreement was illegal.

The Court in Garrity v. McCaskey, 223 Conn. 1, 11 (1992) recognized that although the discretion conferred on the arbitrator by the contracting parties is exceedingly broad, modern contract principles of good faith and fair dealing recognize that even contractual discretion must be exercised for purposes reasonably within the contemplation of the contracting parties. See, Warner v. Konover, 210 Conn. 150, 154 (1981). The Defendants did not expect the arbitrator to find the entertainment lease illegal and unenforceable when there were clauses permitting the arbitrator to sever any "illegal" clauses and to enforce the provisions in the lease if the arbitrator found the dancer an employee not an independent contractor. (Exhibit B, Section 21, A011).

Whether a contract is enforceable or illegal is a question of law resolved by the Appellate Court's plenary authority. See, W.R. Grace and Company v. Local Union 759, 461 U.S. 757 (1983); Parente v. Pirozzoli, 8 Conn. App. 235 (2005) (Because our review of a trial court's determination as to the illegality of a contract is plenary, it is of no consequence that the court did not consider whether the agreement was illegal); Kaiser

Steel Corp. v. Mullins, 455 U.S. 72, 76 (decided illegality of contract issue that was argued but not adjudicated by District Court or Circuit Court of Appeals).

The Defendants did file a Motion to Vacate the Award pursuant to Connecticut General Statutes §52-418. Pursuant to that statute the Court is limited to vacating the award for the four subsections set forth in the statute none of which includes the Arbitrator finding the contract illegal. The Defendants suggest the illegality of contract issue should have been considered by the Appellate Court. The Appellate Court improperly relied upon Practice Book §60-5 for not deciding the issue of illegality of contract. Practice Book §60-5 states the Court may reverse a decision of the Trial Court if it is erroneous in law. It further states the Court is not bound to consider a claim unless it was distinctly raised "at the trial". Here there was no trial by the Superior Court. The Trial Court merely affirmed the arbitration award. In State v. James, 261 Conn. 395, 411 (2002), the court stated the Appellate Court improperly failed to reach an issue concerning a decision by the trial court and under this court's supervisory powers over proceedings on appeal this court has authority to address the subject. The Defendants respectfully request this Court consider the illegality of contract issue.

B. The Appellate Court should have enforced the lease agreement since there is a public policy of freedom of contract.

The Arbitrator in determining whether any damages were owed to the dancers as employees and not independent contractors found the Defendants' argument that the contract entitled them to full wage credit for all entertainment fees earned by the Plaintiffs is "futile". The Arbitrator found "the contract is void and unenforceable given that its inherent purpose is to avoid statutory wages and hour requirements. Parente v. Pirozzol, 87 Conn. App. 235 (2005)".

Notwithstanding the Arbitrator found the Defendants' contract was not made in bad faith.

It was argued to the Appellate Court that there is a strong public policy of parties having freedom to enter into contracts. The Independent Entertainer Coalition is a trade group of exotic dancers that was formed in response to Plaintiff's lawyers forcing dancers to be found employees in order to be awarded attorney's fees. (Exhibit F, A056).

In Schoonmaker v. Cummings and Lockwood of Connecticut, 252 Conn. 416, 425 (2000) the Court held that de novo review of an arbitrator's decision regarding post-employment payments implicated a legitimate public policy. Here, the Arbitrator's finding a lease agreement signed between the dancers and bar illegal implicates a legitimate public policy of the freedom to contract.

The Arbitrator in voiding the agreement is declaring that exotic dancers are not capable of deciding their employment status. There was no evidence that the dancers wanted to be hourly employees and none of the Plaintiffs informed the Defendants prior to this suit that they were invoking their right to be treated as employees as per the entertainment agreement. Section 14D. It was clear that they wanted to be independent contractors and earn money from the customers not the bar. (Exhibit G, A059).

It is respectfully requested this Court exercise de novo review of the entertainment lease since it involves the strong public policy that mature adults have a right of freedom of contract without arbitrary or unreasonable legal restrictions as guaranteed under the contract clause of Article I, Section 10 of the U.S. Constitution. See, Ogden v. Sauders, 25 U.S. 213 (1827) (the clause applies to retroactive impairment of existing contracts, not to general police power regulation that affects future contracts). As in Lochner v. New York,

198 U.S. 45 (1905) (invalidate maximum hour law) and later in Atkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidated a minimum wage law for women) this Court should uphold the lease under the freedom to contract. It is well established that "parties are free to contract for whatever terms on which they may agree. Holiday Hill Holdings v. Lowman, 226 Conn. 748, 755 (1993).

C. The Appellate Court should have severed the clauses in the lease agreement that were illegal.

If the contract is not void but in part voidable, See, Blancato v. Feldoper Corp., 203 Conn. 34, 41 (1987), then the provisions pertaining to the dancers being classified as employees should have been invoked. The Arbitrator should have severed any illegal terms as the lease required. (Exhibit B, Section 21, A011). In fact the lease contained a clause, Paragraph 14C, which applied if Arbitrator found the dancers employees. It specifically required in Paragraph 14C iii that "the club shall be entitled to fulfill wage credit for all entertainment fees retained by entertainer…".

In this case, the Plaintiffs earned approximately $300-$350 per shift. (Exhibit G, A065, A067, A070).

Since the shift was 8 hours it is clear that the entertainment fees credit of $300 to $350 nightly would exceed the minimum wage rate, $8.25 and $8.30, times 8 hours applicable in the years 2013 and 2014. As an employee, the dancers should have received approximately $65 for the shift with minimum wages as opposed to $300-$350 as independent contractors.

The court could have construed the entertainment lease agreement as though the plaintiffs were employees. The Arbitrator should not have voided the contract when finding the defendants acted in good faith as far as paying the plaintiffs.

D. **The Appellate Court should have found there was a manifest disregard of the law allowing the Arbitrator to estimate "average" worked hours over a two-year period.**

"Speculative evidence is not sufficient evidence for the trier to make a fair and reasonable estimate of the plaintiff's damages… Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion." Viejas Band of Kumeyaay Indians v. Lorinsky, 116 Conn. App. 144, 163 (2009). Although "[m]athematical exactitude in the proof of damages is often impossible…the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate." Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp., 245 Conn. 1, 59 (1998).

In System Pros, Inc. v. Kasica, 166 Conn. App. 732, 757 (2016) the court found the plaintiff had not produced sufficient non-speculative evidence of claimed lost wages. "in light of the foregoing, we conclude that the plaintiff has not met his burden of producing evidence of sufficient quality to permit the fact finder to award damages for lost wages without resort to conjecture or speculation." See, American Diamond Exchange, Inc. v. Alpert, 302 Conn. 494, 513 (2011). The court stated that the record lacked evidence that "allows for some objective ascertainment of the amount" of damages for lost wages that the plaintiff sustained that is "not merely subjective or speculative…" "[s]peculative evidence is not sufficient evidence for the trier to make a fair and reasonable estimate of the plaintiff's damages." Because the plaintiff failed to produce sufficient nonspeculative evidence of his claimed damages, the Court found the trier improperly awarded the plaintiff lost wages. Id.

In order to remove the assessment of damages from the realm of speculation, it is necessary to tie the award of damages to objective verifiable facts. Viejas Band of Kumeyaay Indians v. Lorinsky, 116 Conn. App. 144, 163 (2009). The employer has the

right “to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee’s evidence.” Reich v. SNET, 121 F. 3d. 58, 69 (2nd Cir. 1997).

In this case, the defendant provided the arbitrator with daily envelopes indicating which dancers worked and which shift they worked. The keeper of these records testified that the envelopes were tallied by year for each dancer. The exact amount of hours times the minimum wage provided the arbitrator the amount of lost wages for the 2-year time period. Notwithstanding this evidence the arbitrator disregarded the law about computing lost wages based upon the Plaintiffs’ verbal estimate of the “average” hours worked in a week. (Exhibit D, PP.15-19, A036-A040).

CONCLUSION

The Appellate Court had plenary authority to conduct a de novo review of whether the entertainment lease was illegal. The Appellate Court could have severed the illegal portions of the agreement and enforced those provisions which pertained if an Arbitrator found the dancers employees. A credit of entertainment fees should have been applied to any wages owed.

THE DEFENDANTS

BY:/s/ 302481_____
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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 16th day of November, 2022 to the following parties:

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/s/ 302481_____
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APPENDIX
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CRYSTAL HORROCKS ET AL. *v.*
KEEPERS, INC., ET AL.
(AC 44321)

Alvord, Cradle and Flynn, Js.

Syllabus

The plaintiffs sought to recover damages from the defendants for, inter alia, unpaid wages. In their complaint, the plaintiffs, who worked as exotic dancers at a gentlemen's club that was owned and operated by the defendants, alleged that they were improperly characterized as independent contractors as opposed to employees, and, as a consequence, they were unable to obtain workers' compensation benefits, an appropriate minimum wage and overtime pay, and were forced to pay the defendants certain gratuities that they received from the club's customers. The trial court thereafter ordered a stay of the proceedings pending arbitration pursuant to a mandatory arbitration clause in the agreement that governed the employment relationship between the parties. The parties then proceeded to arbitration during which the defendants submitted incomplete written records concerning the number of hours that the plaintiffs worked, and the plaintiffs provided oral testimony on that issue. In his initial award, the arbitrator determined that the plaintiffs were employees rather than independent contractors. In a subsequent award, the arbitrator determined that the parties' employment agreement was illegal and unenforceable because it was an attempt to circumvent statutory wage and hourly requirements, and that the plaintiffs were entitled to be paid the appropriate minimum wage and overtime for the hours they worked during a certain two year period. The arbitrator awarded the plaintiffs $113,560.75 in damages, as well as attorney's fees and costs. Thereafter, the trial court granted the plaintiffs' application to confirm the arbitration awards and denied the defendants' motion to vacate the awards. On the defendants' appeal to this court, *held* that the trial court did not err in rejecting the defendants' claim that the arbitrator's calculation of damages awarded to the plaintiffs constituted a manifest disregard of the law because the defendants had the right to present evidence of the precise amount of work the plaintiffs performed and the arbitrator should have based his damages calculation on the defendants' written records, not on the plaintiffs' oral testimony; in the present case, the defendants were not prevented from submitting evidence to prove the precise number of hours worked by the plaintiffs but, rather, they submitted written records that the arbitrator determined were deficient, and, therefore, in light of that deficiency, the arbitrator properly considered the plaintiffs' oral testimony in calculating the damages award.

(*One judge concurring separately*)

Argued January 13—officially released November 1, 2022

Procedural History

Action to recover damages for, inter alia, unpaid wages, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*, granted the defendants' motion to stay the proceedings pending arbitration; thereafter, the court, *Abrams, J.*, granted the plaintiffs' application to confirm the arbitration awards, denied the defendants' motion to vacate the awards and rendered judgment for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

Stephen R. Bellis, for the appellants (defendants).

Kenneth J. Krayeske, for the appellees (plaintiffs).

tration . . . . On July 18, 2019, [the arbitrator] issued his initial arbitration award wherein he determined that the plaintiffs were appropriately characterized as employees as opposed to independent contractors. Subsequently, on March 17, 2020, [the arbitrator] issued a further arbitration award where he determined, inter alia, that the . . . agreement was illegal and unenforceable because it was an attempt to circumvent statutory wage and hour requirements, and, as a result, the plaintiffs were entitled to be paid the appropriate minimum and overtime wage for the hours they worked for the period between April 14, 2013, to April 14, 2015. [The arbitrator] awarded the plaintiffs $113,560.75 in damages. [The arbitrator] further denied the plaintiffs' request for double liquidated damages because he found [that] the defendants acted with a good faith belief they were complying with the law, but he also gave the plaintiffs $85,000 in attorney's fees and $2981.16 in costs." (Footnotes omitted.)

On March 17, 2020, the plaintiffs filed an application to confirm both the July 18, 2019 and the March 17, 2020 arbitration awards. On April 7, 2020, the defendants filed a motion to vacate the arbitration awards, claiming that (1) the arbitrator exceeded his authority because, when he determined that the agreement was void and unenforceable, the arbitration clause within the agreement was also rendered unenforceable, (2) the arbitrator's award of attorney's fees was improper and should be vacated because the arbitrator relied on the current revision of General Statutes § 31-72 as opposed to the iteration of the statute that was in existence between April, 2013, and April, 2015, and (3) it was incorrect for the arbitrator to rely on oral testimony of the plaintiffs regarding how much time they had worked. By way of a memorandum of decision filed on October 2, 2020, the court, *Abrams, J.*, granted the plaintiffs' application to confirm the arbitration awards and denied the defendants' motion to vacate the awards. This appeal followed.

On appeal, the defendants claim that the trial court erred by failing to conclude that the arbitrator's calculation of damages constituted a manifest disregard of the law because the arbitrator "should have based [that calculation] on the written records [presented by the defendants] not [on] a verbal estimate of the plaintiffs.[2] We disagree.

"[T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 161, 252 A.3d 317 (2020). "Under this highly deferential standard . . . our precedent instructs that three elements must be satisfied before we will vacate an arbitration award on the ground that

the [arbitrator] manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly applicable. . . . [E]very reasonable presumption and intendment will be made in favor of the [arbitration] award and of the arbitrators' acts and proceedings." (Citations omitted; internal quotation marks omitted.) Id., 161–62.

In setting forth the basis for the calculation of his award of damages, the arbitrator recounted the evidence presented by the parties, including evidence of the record keeping procedures used by the defendants to record the hours worked by the plaintiffs. The defendants submitted that they had used two systems to account for attendance. First, they used a sort of "punch card" system, whereby the identification card of each plaintiff was photocopied at the beginning of each shift, and from those "punch cards," the administrative staff would create a "daily business recap." After that recap was produced each day, the punch cards were discarded. The defendants also utilized a biometric system that scanned the plaintiffs' fingerprints at the beginning of their shifts. Due to a system malfunction, however, the records from that system were lost. Although the plaintiffs did not have written records of the hours they had worked, the arbitrator considered their oral testimony regarding those hours, along with the incomplete records of the defendants, to calculate damages.

Before the trial court, the defendants challenged the damages awarded by the arbitrator on the ground that they constituted a manifest disregard of the law. In rejecting the defendants' argument, the court explained that, "[a]lthough the defendants attempt to frame this portion of their motion as an attack on the overly speculative nature of [the arbitrator's] damages calculation, in reality, the defendants believe that [the arbitrator] erred when he credited the plaintiffs' oral testimony over certain written documentation offered by the defendants." The court referred to the arbitrator's assessment of the evidence submitted by the parties, explaining that the arbitrator had concluded that the defendants' record keeping was "inadequate and incomplete" and, therefore, that, "in calculating [the] plaintiffs' damages, [he] . . . necessarily relied on both the plaintiffs' testimony and the partial records of the defendants." (Internal quotation marks omitted.) On that basis, the court noted that the arbitrator "indicate[d] that he examined the defendants' attendance records, but he found that they were not completely accurate. Therefore, he also relied on the plaintiffs' oral testimony in order to determine a complete total of the number of hours that they worked." The court concluded: "This

finding is more than substantial evidence to support [the arbitrator's] damages calculations, and it is not the role of this court to substitute its judgment for that of the arbitrator. Consequently, the court also rejects this argument as a valid basis to grant the defendants' motion to vacate."

On appeal to this court, the defendants again challenge the damages awarded to the plaintiffs on essentially the same ground that they raised before the trial court. Specifically, the defendants contend that "the arbitrator disregarded the law that the defendants have the right to present evidence of the precise amount of work the plaintiffs performed." The defendants claim that the court "should have based the hours worked on the written records of the employer, not [on] a verbal estimate by the plaintiffs."[3] As aptly recounted by the trial court, the arbitrator considered the evidence presented by the defendants but concluded that the defendants' record keeping was "inadequate and incomplete" and, consequently, "relied on both the plaintiffs' testimony and the partial records of the defendants" in calculating the damages that he awarded to the plaintiffs. Contrary to the defendants' assertion, they were not prevented from submitting evidence to prove the number of hours worked by the plaintiffs, but the evidence that they did present, which was considered by the arbitrator, was deficient. Faced with that deficiency, the arbitrator considered the oral testimony of the plaintiffs. It was not improper for the arbitrator to do so. Accordingly, the court did not err in rejecting the defendants' claim that the arbitrator disregarded the law in calculating the damages awarded to the plaintiffs, and thus did not err in granting the plaintiffs' application to confirm, and denying the defendants' motion to vacate, the arbitration awards.

The judgment is affirmed.

In this opinion ALVORD, J., concurred.

[1] Regensburger is the president of Keepers, Inc., and was sued in both his individual capacity and as an agent, principal or representative of Keepers, Inc. He has been involved throughout both the arbitration and the present case. The arbitrator's awards, which were later confirmed by the trial court's judgment, were against both defendants and made no mention of apportionment.

[2] The defendants also claim on appeal that the trial court erred by not holding that the arbitrator's awards violated a legitimate public policy of the freedom to contract, and by failing to sever the enforceable and unenforceable terms of the agreement and to determine that the defendants were entitled to a credit against wages for the entertainment fees paid to the plaintiffs. Because the defendants did not raise these claims before the trial court, we decline to review them. See *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn. App. 578, 590, 276 A.3d 447 ("[t]his court will not review issues of law that are raised for the first time on appeal" (internal quotation marks omitted)), cert. denied, 345 Conn. 902, A.3d (2022); see also Practice Book § 60-5 (reviewing court not bound to consider claim unless it was distinctly raised at trial).

[3] We note that, at oral argument before this court, counsel for the defendants acknowledged that it was not "improper for the arbitrator to credit some of the plaintiffs' [oral] testimony."

FLYNN, J., concurring. I agree that the trial court's judgment should be affirmed. I write separately for the following reasons. It has been usual for this court either to address each claim raised by an appellant on appeal or, in the alternative, to explain why review is not undertaken. In the present case, the first claim of the defendants/appellants, Keepers, Inc., and Joseph Regensburger, is "[w]hether the standard of review for the trial court should have been de novo review rather than the more deferential review afforded arbitration decisions when the arbitrator found the entertainment lease agreement violated public policy and determined it to be illegal." This claim is listed as Roman numeral one in the defendants' statement of issues, and the defendants devote more than one half of their appellate brief to detailing their supporting arguments. I write separately to explain why I think this claim, ultimately, is unreviewable. In support of their argument, the defendants cite to *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 425, 747 A.2d 1017 (2000) ("we conclude that because the arbitrator's decision regarding the postemployment payments implicated a legitimate public policy, that is, facilitating clients' access to an attorney of their choice, the trial court should have exercised de novo review"). In response, the plaintiffs, Crystal Horrocks, Yaritza Reyes, Dina Danielle Caviello, Jacqueline Green, Sugeily Ortiz and Zuleyma Bella Lopez, contend: "Although the first issue raised by the defendants in this appeal is disguised as a legal question concerning the standard of review utilized by the trial court, they are actually asking this court to hold that the trial court applied an improper standard of review to a claim it was never asked to consider. Despite never challenging the arbitrator's determination that the . . . agreement was void as a matter of public policy, in [their] motion to vacate [the arbitration awards], the defendants now ask this court to reverse the trial court on an issue [they] never raised."

The defendants raise for the first time on appeal the issue of whether the arbitrator properly had determined that the agreement was void as a matter of the public policy of the freedom to contract and challenge the standard of review purportedly used by the trial court in addressing that issue. However, there is an obstacle in the path of reviewability. The defendants never raised in connection with their motion to vacate a challenge to the arbitrator's decision that the agreement was void as a matter of the public policy of the freedom to contract, and, as a result, the trial court did not address that issue, much less apply a standard of review to it. The defendants' mere citation in their motion to vacate to *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 416, for the proposition that

the arbitrator in the present case exceeded his authority under General Statutes § 52-418 (a) (4), is not sufficient. Although *Schoonmaker* concerns the necessity to review an arbitrator's decision de novo where it affects the public policy of a client's right to be represented by an attorney of his or her choice, reference to *Schoonmaker*, without more, would not alert a trial court to the distinct freedom to contract ground that the defendants now assert for the first time on appeal. This court cannot review a claim on appeal that the trial court applied the wrong standard of review to a claim that it had not been asked to review. Issues must be distinctly raised before the trial court to be reviewable on appeal. See E. Prescott, Connecticut Appellate Practice & Procedure (7th Ed. 2021) § 8-2:1.1, p. 466; see also Practice Book § 60-5 (reviewing court not bound to consider claim not distinctly raised at trial).

ENTERTAINMENT LEASE AGREEMENT

NOTICE: THIS IS A LEGAL CONTRACT.

DO NOT SIGN THIS AGREEMENT UNLESS YOU UNDERSTAND ALL OF ITS TERMS.

SHOULD YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD REVIEW THOSE QUESTIONS WITH AN ATTORNEY OR OTHER PERSON OF YOUR CHOICE PRIOR TO EXECUTING

THIS AGREEMENT.

This Agreement (hereinafter "Agreement") is made this as of the date executed below by and between the Entertainer indentified above and the Club.

WHEREAS the Club operates an entertainment venue at the Premises wherein it provides nude and/or semi-nude entertainment to the adult general public: and

WHEREAS the Entertainer is an adult, over the age of 18/21 (circle). who desires to perform live nude and/or semi-nude adult entertainment at the Premise: and

WHEREAS the Entertainer desires to enter into this Agreement in order to present nude and semi-nude adult entertainment.

Now, therefore, the Club and the Entertainer, in consideration of the terms and conditions of this Agreement, mutually agree to the following terms and conditions:

1. TERMS OF AGREEMENT

This Agreement is effective as of the date first executed and shall renew annually. unless it is terminated in accordance
with the provisions of this Agreement.

2.Rent

SEE THE ATTACHED SHEET!!!!!!!!!!!!!!!!!

3. **CLUB OBLIGATIONS.** The Club shall:

A. Provide to Entertainer. during normal business hours. use of designated areas of the for the performance of live semi-nude and/or nude dance entertainment (as permitted by law) and related activities.

B. Provide to Entertainer. at Club's expense. music. lighting. and dressing room facilities: and

C. Pay any and all copyright fees due relative to the music used on the premises.

4. **ASSIGNMENT OF AGREEMENT** This agreement is acknowledged to be personal in nature and my not be assigned absent the express written consent of the Club: however. such consent may not be unreasonably withheld. If the Entertainer is at any time unable to fulfill her contractual obligations. Entertainer has the right to substitute the services of any licensed (if legally required) entertainer who has also entered into an Agreement with the Club.

5. **NON-EXCLUSIVITY** nothing in this shall be deemed to limit the Entertainer to performing only on the Club's premises. On the contrary. the Entertainer is free to perform her entertainment activities at other businesses and at other locations without restriction by the Club. Likewise. nothing in this agreement shall be deemed to prohibit the Entertainer from advertising her services outside of the Club in

Initials

any manner or fashion she so desires. However, Entertainer shall not utilize the Clubs' trademarks, service marks, "logos," or other intellectual property without having first obtained the written approval of the Club for such use.

6. **USE OF PREMISES** The Entertainer agrees to the following
A. To only use premises to perform semi-nude ("Topless") and/or nude dance entertainment (as permitted by law) at the premises;

B. Obtain, keep in full force and effect, and have in her possession at all times while she is on the Premises and available for inspection as may be required be required by law, any and all required licenses and/or permits:

C. Not violate any federal, state, or local laws or government regulations. If Entertainer violates ay such laws or regulations, she will be exclusively responsible for all legal fees, costs, and fines associated with prosecutions. Entertainer acknowledges, understands and agrees that any conduct by her which is in violation of any such laws or regulations is beyond the scope if her authority pursuant to this Agreement, and shall constitute a breach of terms of this Agreement.

D. Pay all Rent and account for all Entertainment Fees as required by this Agreement:

E. Maintain accurate daily records of all income, including tips, earned while performing on the Premises, in accordance with all federal, state and local taxation laws: and

F. Pay for any damages she causes to the Premises and/or to any of the Clubs' personal property, furniture, fixtures, inventory, stock and/or equipment.

7. **Compliance with Rules** The Club shall have the right to impose such rules upon the use of the Premises as the Club deems necessary in order to insure that:
A. No damage to the Clubs' property occurs:

B. The Premises are used in a safe fashion for the benefit of all the entertainers, patrons, employees and the members of the public; and

C. No violations of the law occur on the Premise.

The Entertainer agrees not to violate such rules.

8. The Club has no right to direct or control the nature, content, character, manner or means of Entertainers' entertainment services or of her performances. Entertainer agrees, however, to perform consistent with the industries standards of a professional exotic dance entertainment.

9. **Grant of License by Entertainer** Entertainer hereby grants Club a non-exclusive, royalty free, non-revocable license to the Entertainer's name and likeness to record, photograph, use, sell, publish, distribute, and otherwise commercially use, sell and/or assign the Entertainer's name, voice, likeness, which the parties acknowledge may involve full or partial nudity, in any commercial or non-commercial manner, including but not limited to use in any media format, whether now existing or which comes into existence in the future. Entertainer understands and agrees that no monetary compensation is or will e paid to the Entertainer, either now or in the future for the license granted by this Agreement, rather, this Agreement is adequate consideration for this license granted by the Entertainer to the Club.

10. **Costumes** Entertainer shall supply all her own costumes and wearing apparel, for use during her performances at the Club. The club shall not control the choice of costumes and/or wearing apparel made by Entertainer, although the Club expects, but does not require, the Entertainer to appear, at all times while clothed, in apparel the is consistent with industry standards for a professional entertainer.

11. **Nature of Business** Entertainer understands: 1) That the nature of the business operated at the Premises is that of adult entertainment: 2) that she will be subjected partial and/or full nudity (primarily female) and explicit language; and 3) that se may be subjected to advances by customers, to depictions or portrayals of a sexual nature, and to similar types of behavior, Entertainer represents that she is not, and will not be, offended by such conduct, behavior, depictions, portrayals, and language, and that she assumes any and all risks associated with being subjected to these matters.

12. **Privacy** Entertainer and Club acknowledge that privacy and personal safety re important concerns to the Entertainer. Accordingly, the Club shall not knowingly disclose to any persons who are not associated with the Club, or to any Government entity, department, or agency, either the legal name of the Entertainer, her address, or her telephone number, except upon prior written permission of the Entertainer or as may be required by law.

Initials _____

13. Entertainment Fees The club shall establish a fixed fee for the price of certain performances engaged in on the Premises (referred to as "Entertainment Fees"). Entertainment Fees include, but are not limited, to the charge paid by the customer for personal dances, suite rentals, and similar performances. Nothing contained in this Agreement shall limit Entertainment from receiving "tips" and/or gratuities over-and-above the established price for such performances.

THE PARTIES ACKNOWLEDGE AND AGREE THAT ENTERTINMENT FEES ARE NEITHER TIPS NOR GRATUITIES, BUT ARE MANDATORY SERVICE CHARGE TO THE CUSTOMER FOR OBTAINING SEVICES AT THE PREMISE.

Business Relationship of Parties The following provisions shall govern the business relationship between the parties:

A. The parties acknowledge and represent that they each are engaged in their own separate and independent business activities. Accordingly, the parties specifically disavow any employment relationship between them, and that they agree that this Agreement Shall Not be interpreted as creating an employer/employee relationship or any other contract for employment. Entertainer acknowledges and represents that she is providing no services for or to the Club, and that the Club does not employ her any capacity. Accordingly:

1. Entertainer represents that she does not desire to perform as am employee of the Club subject to the employment terms and conditions outlined but, rather, desires to perform as a independent professional entertainer consistent with the other provisions of this agreement. Accordingly, Entertainer understands and acknowledges that by entering into this agreement and by performing pursuant to its terms, she is expressly representing to the Club that she does not desire to enter into an employment relationship with the Club;

2. Entertainer understands that the club will not pay her hourly wage or overtime pay, advance or reimburse her for any business related expenses, or provide to her any other employee-related benefits, and that she I not entitled to receive any workers compensation benefits or unemployment insurance benefits unless entertainer provides her own workers compensation insurance coverage and unemployment compensation benefits.

B. The Club and Entertainer acknowledge and represent that if the relationship between them that was of employer and employee, the Club would be required to collect, and would retain, all Entertainment fees paid by customers to the Entertainer. Thus, Entertainer specifically acknowledges that in the event of a Employer/Employee relationship all Entertainment Fees would, both contractually and as a matter of law, be the property of the Club, and not the property of the Entertainer. Thus the parties expressly acknowledge and agree:

THAT ENTERTAINERS RIGHTS TO OBTAIN AND KEPP ENTERTAINMENT FEES PRSUNT TO THIS AGREEMENT IS SPECIFICALLY CONTIGENT AND CONDITIONED UP;ON THE BUSINESS REALTIONSHIP OF THE PARTIES BEING OTHER THSN THAT OF EMPLOYER AND EMPLOYEE.

Under an employment relationship, Entertainer would be paid on an hourly basis at a rate equal to the applicable minimum wage n the date that the Entertainer performed on the premise, which at the time of execution of this agreement, is $8.25 per hour. Entertainer would further be entitled to retain "tips" and/or gratuities—*but not* Entertainment Fees—that she may collect while performing on the Premises. Except as required by law, the Club would not provide the entertainer any other benefits.

The parties additionally acknowledge and represent that were the relationship between them to be that of employer and employee, Entertainers employment would be "at will" (meaning either party could terminate the employment relationship with one and other, for any reason and at any time), and that the Club would be entitled to control, among other things, Entertainers work schedule and the hours of work; job responsibilities; physical presentation (such as make-up, hairstyle, ect.); costumes and other wearing apparel; work habits; the selection of her customers; the nature content, character, manner and means of her performances; and her ability to perform at the other locations and for the other businesses. Entertainer hereby represents that she desires to be able to make the choices of all these matters herself and without the control of the Club, and the Club and Entertainer agree by the terms of this agreement that all such decisions re exclusively reserved to the control of Entertainer.

C. If any court, tribunal, Arbitrator, or governmental agency determines, or if Entertainer at any time contends, claims, or asserts, that the relationship between the parties is that of employer and employee and that Entertainer is then entitled to the payment of wages from the Club, *all the following apply:*

i All Entertainment Fees received by Entertainer at any time while she performed at the Club shall be deemed the gross income and the sole property of the Club;

ii. In order to comply with the applicable tax laws and to ensure that the Club is not unjustly harmed and that Entertainer is not unjustly enriched by the parties having financially operated pursuant to the terms of this Agreement, the Club and Entertainer agree that Entertainer shall surrender, reimburse and pay to the Club, all Entertainment fees received by Entertainer at any time she performed on the premises- all of which would otherwise have been collected and kept by the Club had a portion not been retained by Entertainer under the terms of this agreement- and she shall immediately provide a full accounting to the Club of all tip income which she received during that time;

Initials

iii. All Entertainment Fees shall be deemed service charges and shall be accounted for by the Club as such. The Club shall be entitled to full wage credit for all Entertainment Fees retained by Entertainer. and such withheld fees shall constitute wages paid from the Club to Entertainer. In the event the entertainer refuses to or is unable to return Entertainment Fees to the Club. the Club shall immediately submit to the IRS and applicable state taxing authorities all necessary filings regarding such income consistent with subparagraphs this Agreement and be entitled to offset the Entertainment Fees retained against any wages or other payment owed the Entertainer; and

iv. The relationship of the parties shall immediately convert to that of the employer and employee upon the terms as set forth in subparagraph 14(B). Subject to the other terms of this Agreement, the provisions of subparagraph 14(B) shall also be used to calculate any past due wages

D. If at any time Entertainer believes that, irrespective of the terms of this Agreement. she is or should be treated a an employee by the Club or that her relationship with the Club is that of employee. Entertainer shall immediately. but in no event later than three business days thereafter. provide notice to the Club in writing of her desire to be treated as an employee consistent with the terms of the paragraph 14(B) of this Agreement and applicable law.

15. **Taxes.** Entertainer shall be exclusively responsible for. and shall pay, all federal, state and local taxes contributions imposed upon any income earned by Entertainer while performing on the Premises (including but not limited to income taxes and social security obligations).

16. **Showtimes.** Entertainer shall exclusively determine the days and times when she performs at the Club (one performance day being referred to as a "Showtime"), and the Club shall make the Premises available to Entertainer during normal business hours for her showtimes, although an Entertainer has no obligation to preselect a showtime, once an Entertainer advises the Club that she desires to perform on a particular showtime, she shall be responsible for the payment of rent for that showtime regardless of whether she performs or not that showtime.

Allocation of Entertainment Fees. The club and Entertainer shall be entitled to tha portion of the Entertainment Feed as set forth below:

A. Entertainer shall be entitled to retain 100% of the Entertainment Fees paid by customer for each personal dance. The Club shall retain the balance;

B. The Entertainment Fees paid by a customer for each ½ hour suite rental shall be retained by the Club;

C. The Entertainment Fees paid by the customer for each 1 hour or longer suite rental shall be retained by the Club;

D. The Club may establish mandatory fees for additional performances on the Premise and in the event that such mandatory fees are established, those fees. shall be split as published by the Club from time to time.

All Entertainment Fees generated by the performances of the Entertainer during showtime shall be divided between the Club and Entertainer at the end of that showtime.

The Club and the Entertainer agree that in the event that the business relationship between the Club and Entertainer is ever reclassified. that despite the provisions of this Paragraph, the provisions of Paragraph 14(B) and (C) of this Agreement shall apply to Entertainment Fees.

18. **Material Breach by Club.** The Club materially breaches this Agreement by:

A. Failing to maintain any and all required licenses and/or permits:

B. Failing to maintain in full force any and all leases with the owner of the Premises:

C. Failing to maintain in full force all utilities services for the Premises;

D. Willfully violating any federal. state. or local law or regulation in regard to the operation of the Club: or

E. Violating any public health or safety rules or concerns.

The Club shall not be liable for any material breach as set forth in this paragraph 18 due to acts of God or to any other cause beyond the reasonable control of the Club.

Initials DC

19. **Material breach by Entertainer.** Entertainer materially breaches this Agreement by:

A. Failing to pay rent or accurately account for Entertainment Fees;

B. Failing to maintain any and all required licenses and/or permits;

C. Willfully violating any federal, state, local law ir regulations while on the Premises:

D. Failing to have governmental issued photo identification on her persons at all times while on the Premises:

E. Violating any public health or safety rules or concerns.

20. **Termination/Breach.** Either party may terminate this Agreement, without cause, upon thirty (30) days notice to the other party. Upon a, material breach, the non-breaching party may terminate this Agreement upon twenty-four (24) hours notice to the other party, or as otherwise provided by law. Nothing in this paragraph, however, shall allow Entertainer to perform on Premises without valid license or permit (if applicable) and photo identification, or to continue to engage in conduct in violation any laws, regulations, or public health or safety concerns.

21. **Severability.** In the event that any term, paragraph, subparagraph, or portion of this Agreement is declared to be illegal or unenforceable, this Agreement shall, to the extent possible, be interpreted as if that provision was not part of this Agreement: it being the intent of the parties that any illegal or unenforceable portion of this severable from this Agreement as a whole. Nevertheless, in the circumstance of a judicial, arbitration, or administrative determination that the business relationship between Entertainer and the Club shall be governed by the provisions of subparagraphs 14(B) and 14(C) of this Agreement.

22. **Governing Law** This agreement shall be interpreted pursuant to the laws of the State of Connecticut.

23. **Arbitration/Waiver of Class and Collective Actions/Attorney Fees and Costs.**

A. Binding Arbitration. Any and all controversies between the Entertainer and Club, regardless of whether such claims sound in contract, tort, and/or based upon a federal or state statue, shall be exclusively decided by binding arbitration held pursuant to and in accordance with the Federal Arbiuration Act ("FAA"), and shall be decided by a single neutral arbitrator agreed upon by the parties, who shall be permitted to award, subject only to the restrictions contained in this Paragraph 23, any relief available in court. All parties waive any right to litigate such controversies, disputes, or claims in a court of law, and waive the right to trial by jury.

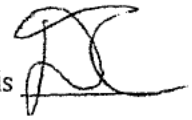
In the event that the parties are unable to mutually agree upon an arbitrator, either party may apply to the American Arbitration Association ("AAA") for the selection of an arbitrator. Any arbitration shall be conducted consistent with the rules of the AAA, except as expressly or implicitly modified by this Agreement. In the event that the dispute relates to an "Employment Related Claim" then the AAA Employment Rules shall apply. All other disputes shall be governed by the AAA Commercial Rules.

In arbitration, all parties shall have the right to be represented by legal counsel, the arbitrator shall permit only that minimal discover, including responses and documents produced shall be deemed confidential and shall only be used and/or disclosed in relationship o the then pending proceeding, the parties shall have the right to subpoena witnesses in order to compel their attendance at hearing and to cross-examine witnesses, the proceedings shall be conducted in accordance with the requirements of rudimentary due process required of arbitrations, and the arbitrators decision shall be final, subject only to review under standards set forth in the FAA. For claims based upon an employment related statue, such as Fair Labor Standard Act or other similar federal or state statue, the club shall pay all fees charged by AAA and the arbitrator, which the Entertainer would not have had to pay in a court proceeding.

The arbitrators shall have the exclusive authority to resolve any and all disputes over the validity of any part of this agreement, including *the validity of the Arbitration agreement and any award by the arbitrator may be entered as a judgment in any court having jurisdiction.*

B. Cost and Fees Any Judgment, order, or ruling arising out of a dispute between the parties shall, to the extent permitted by applicable *law, award costs incurred for the proceedings and reasonable attorney fees to the prevailing party. This provision shall not, however,* apply employment related claimed prosecuted under federal or state statue which provides for the award of fees and costs. In such circumstances, the federal or state statue shall govern the award fees and/or costs for the statutory claims. Notwithstanding the forging, nothing shall restrict the Arbitrator from awarding the Clubs cost and/or attorney fees in the event that the arbitrator determines that a claim is frivolous, pursued in bad faith, and/or conducted in a manner which multiplies the proceedings unreasonably and/or vexatiously.

C. Class and Collective Action Waiver. Entertainer agrees that all claims or disputes between the Entertainer and the Club (and any other persons or entities associated with the Club) will be brought individually; that she will not consolidate her claims with the claims of any other individual; that she will not seek class or collective action treatment for any claim that she may have; that she will not participate in any class or collective action against the Club or against any persons or entities associated with the club. If at any time Entertainer is

Initials 

made a member of a class in any proceeding, she will "opt out" at the first opportunity, and should any third party pursue any claims on her behalf, Entertainer shall waive her rights to any such monetary recovery.
In other words the Entertainer expressly waives her right to prosecute, participate in, or pursue a class or collective action and/or other joint proceeding against the Club. This Paragraph 23(C) shall survive any judicial determination that the arbitration agreement contained herein is unenforceable for any reason.
D. Survival. All provisions and subparagraphs of this paragraph 23 shall survive termination of this agreement.

BECAUSE OF LEGAL RESTRICTIONS, THE CLUB WILL NOT ENTER INTO AN AGREEMENT WITH AN ENTERTAINER WHO IS UNDER THE AGE OF 18 / 21 (circle one). ENTERTAINER SPECIFICALLY REPRESENTS THAT SHE IS OF LAWFUL AGE OR OLDER, THAT SHE HAS PROVIDED --OR WILL PROVIDE UPON REQUEST --APPROPRIATE IDENTIFICATION VERIFYING HER AGE, AND THAT SUCH IDENTIFICATION IS VALID AND AUTHENTIC. ENTERTAINER ALSO REPRESENTS THAT SHE IS LAWFULLY ENTITLED TO WORK AND/OR PERFORM IN THE UNITED STATES.

BY SIGNING TIDS DOCUMENT, ENTERTAINER REPRESENTS THAT SHE HAS RECEIVED A COpy OF, AND HAS FULLY READ, TIDS AGREEMENT; THAT SHE UNDERSTANDS, AND AGREES TO BE BOUND BY, ALL OF ITS TERMS; AND THAT SHE HAS BEEN PERMITTED TO ASK QUESTIONS REGARDING ITS CONTENTS AND HAS BEEN GIVEN THE OPPORTUNITY TO HAVE IT REVIEWED BY PERSONS OF HER CHOICE, INCLUDING ATTONEYS AND ACCOUNTANTS.

THIS AGREEMENT IS NOT BINDING UNTIL SIGNED BY AN AUTHORIZED REPRESENTATIVE OF THE CLUB. "CLUB"

KEEPER'S GENTLEMAN'S CLUB

BY: _____
(Signature)

JOSEPH ROSENSBURGER
(Printed Name)

Its: OWNER - MANAGER
(Position)

"Premises"
354 Woodmont RD.
Milford, CT. 06460

Date: 1-24, 2014

"ENTERTAINER"

_____
(Signature)

Dina Covello
(Printed Name)

Ricki
(Stage Name)

203-7046332
(Phone Number)

1436 Wolcott Rd
(Address)

Wolcott CT 06716
(City, State, Zip Code)

_____
(Entertainer's license/permit number-if applicable)

Date: 1/24, 2014

Initials _____

DOCKET NO. NNH-CV-15-6054684-S	:	SUPERIOR COURT
CRYSTAL HORROCKS, ET AL	:	J.D. OF NEW HAVEN
VS.	:	AT ARBITRATION
KEEPERS, INC. ET AL	:	JULY 18, 2019

ARBITRATION AWARD

The issues in this Arbitration are set forth in the parties' Submission to Binding Arbitration, dated November 10, 2016, and approved by the court (*James Wilson Abrams, J.*) on November 29, 2016. The crux of the dispute between the parties is whether the plaintiffs are independent contractors or employees, subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* and Connecticut Labor Law, Connecticut General Statutes § 31-58, *et seq.* Extensive evidence, including the testimony of five of the plaintiffs and the defendants' representatives, was presented by the parties to the undersigned. In addition, counsel have submitted very thorough legal memoranda.

The plaintiffs argue that they are employees. In support of this position, they rely on Hart v. Rick's Cabaret Intern., Inc., 967 F. Supp. 2d 901 (2013), in which the United States District Court for the Southern District of New York determined that exotic dancers at an adult entertainment club were employees under the FLSA and the New York Labor Law (NYLL), § 190 *et seq.* & § 650 *et seq.* The plaintiffs additionally contend that under Connecticut's "ABC Test," as set forth in Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act, 320 Conn. 611

(2016), the level of control that the defendants exerted over the plaintiffs compels a finding that the plaintiffs are employees, and not independent contractors.

The defendants, by contrast, argue that the plaintiffs are independent contractors, and not employees. They rely on the express language in the parties' written agreement, which states explicitly that they are independent contractors and not employees. The defendants further argue that because the written contract is unambiguous, the Arbitrator cannot look to parole evidence. To the extent that the Arbitrator does look outside the four corners of the contract, the defendants alternatively argue that they do not exercise sufficient control over the plaintiffs to require a finding of an employer/employee relationship. They contend that Keepers is not an exotic dance club *per se*, but rather is a bar that happens to have dancers, and argue that the dancers are not integral to their business.

For the reasons that follow, I conclude that the plaintiffs are employees, and not independent contractors, and are thus subject to the FLSA and Connecticut law.

A. The Language in the Parties' Contract

At the outset, the defendants' argument that the terms of the parties' contract controls, and that the Arbitrator cannot look to parole evidence, is unavailing. See Latimer v. Administrator, Unemployment Compensation Act, 216 Conn. 237, 251–52 (1990) ("Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says. Such provisions in a contract are not effective to keep an employer outside the purview of the act when the established facts

bring him within it. 'We look beyond the plain language of the contract to the actual status in which the parties are placed.'" (internal citations omitted)).

Accordingly, the Arbitrator must consider all of the relevant testimony and documentary evidence to determine whether the plaintiffs are employees or independent contractors.

B. Hart v. Rick's Cabaret Intern., Inc.

The facts of Hart v. Rick's Cabaret Intern., Inc., *supra*, are nearly identical to the facts of the present case. In that matter, the plaintiffs were dancers working at an adult entertainment club, and despite the fact that the club had always classified the dancers as independent contractors, the dancers argued that they should in fact be considered employees. As in the present case, the club did not pay the dancers a salary, and instead the dancers received money from customers for personal dances and for entertaining customers in semi-private rooms. From the money that the dancers received from customers they were required to pay a house fee and a tip-out fee to the DJ. Although the dancers provided their own wardrobes, there were certain rules that the dancers were required to follow, and they would be fined for violation of the rules. Specifically, the dancers were required to work an entire eight hour shift, to clock in and out upon arrival and exit, to check-in with the DJ upon arrival to be put on the rotation, and were prohibited from leaving the club with a customer.

In determining whether the plaintiffs were independent contractors or employees, the Rick's Cabaret court looked to the FLSA's "Economic Realities Test." The essential elements of that test are: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the

business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Based on the above facts, and others, the Rick's Cabaret court first determined that the club had "significant control over the dancers;" id. at 916; and that "the factor of control weighs overwhelmingly in favor of a finding that the dancers were employees, not independent contractors, under the FLSA." Id. at 919. Next, the court looked to the second factor and compared the relative investments of the club and the dancers, and found that the club "exercised a high degree of control over a dancer's opportunity for profit" and, thus, the dancers were more akin to wage earners than to independent entrepreneurs. Id. at 920.

In regard to the third factor, the degree of skill and independent initiative required, the Rick's Cabaret court held that there was limited genuine skill required to be an exotic dancer. Id. Although the court determined that the fourth factor, the permanency and duration of the employment relationship, favored a finding that the dancers were independent contractors and employees, the court also found that this factor was outweighed by the other factors. Id. at 921. Finally, as to the fifth factor, the court unequivocally rejected the club's argument that the dancers were not integral to the club, and instead found that this factor weighed in favor of a finding that the dancers were employees. Id.

Based on a totality of these factors, the court determined that the dancers were employees and not independent contractors. Id. at 922. The court further noted that it was not the first court to address whether dancers at a strip club are employees under

the FLSA, and stated that "[n]early '[w]ithout exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage.'" Id. at 912 (quoting Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1348 (M.D. Fla. 1997).

The facts of the present case require the same conclusion: that the plaintiffs are employees under the FLSA. Although there are certainly some differences between the present case and Rick's Cabaret—i.e., the dancers at Rick's were strippers and the plaintiffs are dancers who do not remove their clothes, the dancers at Rick's were required to work a minimum of three days per week and the dancers at Rick's had mandatory monthly meetings—those differences are not sufficient to distinguish the present case from the Rick's Cabaret court's analysis. As set forth above, the facts of Rick's Cabaret and the present case are nearly identical. There is no compelling reason to depart from the rationale set forth in Rick's Cabaret.

Specifically, the application of the following factors to the evidence presented in this case demonstrates that the plaintiffs here meet the FLSA five-part test:

(1) Keepers exercises a substantial degree of control over the plaintiffs. The plaintiffs must follow certain rules and are subject to a fine for violating the rules. They must clock-in and clock-out and must check-in with the DJ who then determines their rotation. They must pay a portion of their nightly tips to the DJ and are fined for missing a shift or leaving early or arriving late to their shift. The plaintiffs must also follow a certain dress code, may not leave with customers and may not spend downtime in the dressing room. Violation of these rules may result in fines, suspension from work,

and in some cases, confiscation of a dancer's driver's license as collateral for payment of fines.

(2) The plaintiffs have minimal opportunity for profit or loss or investment in their business. Although it is undisputed that the plaintiffs can earn more money through personal dances and/or entertaining customers in the VIP room, the plaintiffs are required to participate in specified stage rotations. They are also required to work on a less busy weekday in order to work on the more desirable weekend. The defendants also set and impose the minimum costs for personal dances and VIP room use, and take a portion of the plaintiffs' nightly income.

(3) The plaintiffs' services require limited skill and independent initiative. As the Rick Cabaret's court and others have held there is limited genuine skill required to be an exotic dancer. See Rick's Cabaret Intern., Inc., 967 F. Supp. At 920.

(4) The plaintiffs' employment relationship with the defendants is not permanent, and this factor weighs slightly in favor of the defendants. Although the plaintiffs were permitted to make their own schedule, and could work as often as they pleased, the plaintiffs were also required to work on a slow night in order to have the opportunity to also work on a busier night. There was also conflicting testimony as to whether the plaintiffs were free to work at competing establishments. This factor weighs in favor of the defendants, but does not carry significant weight when compared to the other factors.

(5) Finally, the plaintiffs are integral to the defendants' businesses. Although the defendants contend that the plaintiffs are not integral to their business, and, rather, that Keepers is a sports bar that happens to have dancers, this argument is

not persuasive. The same argument was rejected in Rick's Cabaret. Id. at 921. In this case, the evidence powerfully demonstrates that dancing is an essential part of the defendants' businesses.

C. **Analysis Under the Connecticut ABC Test**

While it is not necessary to determine the application of the ABC test in light of the findings under the FLSA, for the sake of clarity and completeness, I will also consider whether the plaintiffs are employees under Connecticut law. The ABC test provides the primary analyses to determine whether an individual is an employee or independent contractor in Connecticut. The test is embodied in subdivisions (I), (II) and (III) of Connecticut General Statutes § 31–222(a)(1)(B)(ii), and consists of three parts. To avoid an employment relationship the objecting-employer must show that the services at issue are performed: (a) free from control or direction of the employing enterprise; (b) outside the usual course of the business, or outside of all the places of business, of the enterprise and (c) part of an independently established trade, occupation, profession or business of the worker. See Standard Oil of Connecticut, Inc. v. Administrator, Unemployment Compensation Act, 320 Conn. 611 (2016). "The test is conjunctive; all parts must be satisfied to exclude an employer from the Act." Latimer v. Adm'r, Unemployment Comp. Act, 216 Conn. 237, 247 (1990).

Comparing the facts of the present case to the factors of the ABC test, it is apparent that the plaintiffs are employees and not independent contractors. As discussed above, the defendants exercise significant control over the plaintiffs. Indeed, the plaintiffs must follow certain rules, must pay fines for violating those rules, must clock-in and clock-out at certain times, must pay a fee to the DJ, must follow a dress

code, must participate in stage rotations, cannot remain in the dressing room in between rotations and cannot leave with a customer. The plaintiffs are further fined for missing a shift and for leaving early or arriving late to a shift. Because the prongs of the ABC test are conjunctive, the inability of Keepers to satisfy the first prong of the test necessarily results in a conclusion that an employer-employee relationship exists. Accordingly, this factor alone is fatal to the defendants' claim that the plaintiffs are independent contractors.

Nevertheless, the remaining factors also weigh in favor of a finding that the plaintiffs are employees and not independent contractors. Although there was conflicting testimony as to whether the plaintiffs were permitted to perform their services outside of Keepers, the Arbitrator finds that the more credible evidence is that the plaintiffs were not permitted to do so and thus the defendants cannot satisfy the second factor of the ABC test. Finally, in regard to the third factor of the test, the plaintiffs were not engaged in an independently established trade, occupation, profession or business. As the Rick's Cabaret court found, exotic dancing is not a specialized skill. Moreover, the dancers require no licensure; they do not hold themselves out as an independent business through business cards, printed invoices, or advertising; they do not have a place of business separate from Keepers; they do not have a capital investment in an independent business; they do not handle their own liability insurance; they do not perform their services under their own name; they cannot employ or subcontract others; they do not have a saleable business; they do not perform their services for more than one entity, and their services do not affect their own goodwill rather than the defendants. See Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act, 324

Conn. 822, 839–40 (2017) (setting forth the elements that should be considered in deciding factor C of the ABC test).

The defendants have the burden of showing that the plaintiffs are independent contractors, and not employees, under the ABC test. See Latimer, 216 Conn. at 247. As the defendants have failed to satisfy this burden, I conclude that the plaintiffs are, accordingly, employees under Connecticut law.

D. Conclusion

The plaintiffs have met their burden of proof that they are employees under both the FLSA and the ABC test. Accordingly, a plaintiff's award will enter as to liability only. The parties agreed that damages will be assessed following this liability determination.

SO ORDERED.

Robert L. Holzberg, Judge (Ret.)
Arbitrator
Pullman & Comley LLC
90 State House Square
Hartford, CT 06103-3702
860-424-4300

DOCKET NUMBER NNH-CV15-6054684-S	:	SUPERIOR COURT
CRYSTAL HORROCKS, ET AL.	:	J.D. OF NEW HAVEN
VS.	:	AT NEW HAVEN
KEEPERS, INC., ET AL	:	MARCH 17, 2020

CORRECTED ARBITRATION DAMAGES AWARD

The original Arbitration Damages Award of March 12, 2020 for plaintiffs Zulema Lopez and Yaritza Reyes were calculated incorrectly. As detailed on pp. 18-19 of this Corrected Arbitration Damages Award, the modified award for Ms. Lopez is $5,000.00 and the modified award for Ms. Reyes is $13,497.30. The corrected total award for all plaintiffs, therefore, is $113,560.75 plus $85,000.00 in attorneys' fees and costs of $2,981.16.

Plaintiffs are a group of women dancers who performed at defendants' gentlemen's club, where they made their earnings by performing on-stage and in private "VIP" rooms for male patrons. Plaintiffs' compensation consisted of fees set by the defendants and tips provided by the customers.[1] The defendants are Keepers, Inc., the gentlemen's club which employed the plaintiffs, and the President of Keepers, Inc., Joseph Regensburger.[2]

I. Background

The preliminary question in this dispute was resolved by an award on July 18, 2019, in which the undersigned determined that the plaintiffs are employees of the defendants, subject to the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.* and Connecticut

[1] The nature and amount of the fees and tips received by the plaintiffs is discussed more fully in Section II, *infra*.

[2] Mr. Regensburger filed a Chapter 13 bankruptcy petition on January 2, 2020. It was dismissed on February 25, 2020.

Labor Law, Connecticut General Statutes § 31-58, *et seq.* What remains to be assessed is the amount of damages to be awarded to each of the individual plaintiffs.

The plaintiffs argue that the defendants violated the Connecticut wage and hour laws, and the FLSA's equivalent overtime, minimum wage, and record-keeping requirements, and are entitled to be compensated for the hours they worked at the then prevailing minimum wage plus punitive damages as a result of the defendants' willful violation of State and Federal statutes. The plaintiffs seek the award of: 1) lost wages and fees paid to Keepers, Inc.; 2) punitive damages; and 3) attorneys' fees.

The defendants object to the award of any damages. They argue that: 1) the plaintiffs' evidence of damages is too speculative to constitute a basis for an award; 2) that it would constitute unjust enrichment for the plaintiffs to retain their tips and also be awarded wages; 3) that under the terms of the parties' contract, all tips collected and retained by the plaintiffs for their work must be credited towards any wages owed; and 4) that they have not willfully violated any state or federal laws and therefore are not subject to punitive damages and attorney's fees.

II. The Entertainment Lease Agreement

a. Illegality of the Contract

As an initial matter, the defendants' argument that the terms of the parties' contract entitle them to full wage credit for all entertainment fees earned by the plaintiffs is futile. The contract is void and unenforceable given that its inherent purpose is to avoid statutory wage and hour requirements. Parente v. Pirozzoli, 87 Conn. App. 235 (2005). It is well-settled that a Connecticut court will not "lend its assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law." (Internal quotation marks omitted; citations omitted.) Id. at 246. "[A]greements contrary to public policy, that is those

that negate laws enacted for the common good, are illegal and therefore unenforceable. Contractual rights arising from agreements are subject to the fair exercise of the power of the state to secure health, safety, comfort or the general welfare of the community." (Internal quotation marks omitted; citations omitted.) Id. "[A]greements that are legal on their face, yet are designed to evade statutory requirements, are routinely held unenforceable." Id.[3] Because I conclude that the plaintiffs are employees, not merely lessors of space, and the so-called Entertainment Lease Agreement is unenforceable as an attempt to circumvent state and federal wage and hour laws, the defendants cannot cherry pick those provisions of the lease that are advantageous to them.

b. Terms of the Contract

Pursuant to the contractual terms of the Lease Agreement, certain fees were imposed on the plaintiffs as a condition of their ability to work at Keepers. If the plaintiffs did not pay these fees, they were not able to work.

i. House Fees

According to the defendants, the relationship between the parties is dictated by the terms of the so-called Entertainment Lease Agreement (the "Lease"). The Lease requires the plaintiffs to "pay rent" according to a graduated fee schedule, ranging from $20 to $100, which the plaintiffs were required to pay at the door of defendants' club as a condition of starting their shift. Failure to pay rent constitutes a material breach under the terms of the Lease. In addition to the fees paid at the door, plaintiffs are also required to pay the DJ a separate fee after every shift. According to plaintiffs' testimony, the average cost of these fees (collectively "house fees") to them ranged from $20 to $60 for each shift. Testimony

[3] In a suit between exotic dancers and the gentlemen's club that employed them, involving facts which this Arbitrator finds to be analogous to the ones in this matter, Arbitrator Albert Zakarian invalidated a similar Entertainment Lease agreement as unlawful and unenforceable because its "inherent purpose" was to "violate the law." D'Antuono v. C & G of Groton, et al., AAA No. 11-160-02069 (June 17, 2013) (Zakarian, A.).

revealed that there were day shifts and night shifts, with an average shift ranging from six to eight hours, depending on what time a dancer came in. Dancers who arrived past the scheduled start of their shift were subject to pay a higher fee, which fee increased the later the arrival time.

ii. Entertainment Fees

The defendants' club established a "fixed fee for the price of certain performances . . . (referred to as 'Entertainment Fees')." See Paragraph 13. Testimony revealed that these "certain performances" were those known colloquially as "lap dances". Distinct from the fees collected for "lap dances", the club also imposed fees for performances in more secluded areas (referred to colloquially as VIP rooms). These fees are paid by the customers. For example, a "lap dance" would cost a customer on average $25, which the plaintiffs kept. For performances in VIP rooms, the club collected some portion of a club-imposed fee as a "rental fee" and the plaintiffs retained whatever the patron paid in excess of the rental fee, apparently in the form of tips by patrons to the plaintiffs once in the secluded area. In bold text underneath the Lease's entertainment fees provision is a representation that the parties acknowledge that "entertainment fees are neither tips nor gratuities but are [sic] mandatory service charge to the customer for obtaining services at the premises." Id. The Lease also conditions the plaintiffs' right to "obtain and [sic] keep entertainment fees [sic] pursuant to this agreement . . . [sic] upon the business [sic] relationship of the parties being other [sic] than that of employer and employee." Id. Pursuant to the lease terms, if a court, tribunal, arbitrator or government agency were to find that the parties were in an employer-employee relationship entitling the plaintiffs to wages, the entertainment fees would constitute gross income to the club. In that event, the plaintiffs would be required to reimburse the club all entertainment fees received, and such fees would be deemed service charges entitling the

club to full wage credit for whatever wages the plaintiffs are deemed to have earned. See Paragraph 14C.

iii. Nonpayment of Wages and Benefits

The Lease's provisions purport to prohibit the creation of an employer-employee relationship. The Lease specifies that plaintiffs are not to be paid an hourly wage or overtime pay, reimbursed for business expenses, nor provided any employee-related benefits including workers' compensation or unemployment benefits. See Paragraph 14A. In the event of a finding that the plaintiffs are employees, plaintiffs are to receive the hourly minimum wage, without benefits, and entitled to retain tips "*but not* Entertainment Fees." (emphasis in original) Paragraph 14B.

iv. Recordkeeping

There is little provision for recordkeeping under the Lease. The plaintiffs are responsible for maintaining "accurate daily records of all income, including tips." Paragraph 6E. The defendants' record-keeper Randi England testified that there are gaps in the defendants' records of the plaintiffs' hours of work and payment of fees. The incompleteness and gaps in the defendants' records are the result of a combination of factors.[4]

c. The Enforceability of the Lease

In the July 18, 2019 interim award, I concluded that the plaintiffs were employees of the defendants' club and were therefore entitled to the protections and benefits provided to employees by state and federal laws. Under both Connecticut and federal law, employees are entitled to receive a minimum wage for hours worked as well as overtime pay. Conn. Gen. Stat. §§ 31-58, 60; 29 U.S.C. §§ 206, 207. The Lease agreement between the parties in this dispute does not provide for the payment of hourly wages or overtime pay to the

[4] A more thorough discussion of the mechanics of the defendants' recordkeeping practices is discussed in Section V of this decision.

plaintiffs, unless it is determined that an employment relationship exists. It is well established that the attempt to transform an employer-employee relationship into another type of status such as lessor-lessee is illegal and a violation of both State and Federal wage-hour laws and renders the contract itself unenforceable. Parente, 87 Conn. App. at 245 (holding that any agreement formed with the purpose of violating state laws is contrary to public policy and cannot be enforced).

Employers in Connecticut are prohibited from demanding, requiring, requesting, receiving or exacting "any refund of wages[5], fee, sum of money or contribution from any person, or deduct any part of the wages agreed to be paid, upon the representation or the understanding that [such payments are] necessary to secure employment or continue in employment." Conn. Gen. Stat. § 31-73(b). In other words, an employer cannot require an employee to pay rent in order to work. As plaintiffs point out in their brief, there are numerous provisions in the Lease which contravene this rule. Paragraph 2, which provides for the payment of rent, and Paragraph 17 which calls for a distribution of the entertainment fees, requires the plaintiffs to distribute sums of money from their earnings to the club. The payment of House fees, including payment to the DJ, were mandatory requirements if the plaintiffs wanted to work. See Paragraphs 6 and 19. These Lease requirements constitute illegal refund of wages for furnishing employment under Connecticut law. Conn. Gen. Stat. § 31-73, and as such, render the lease and its terms unenforceable. This conclusion is in accord with the decision of another arbitrator who assessed a different lease agreement containing similar provisions, including terms which required exotic dancers to pay a shift

[5] "refund of wages" means: "(1) The return by an employee to his employer or to any agent of his employer of any sum of money actually paid or owed to the employee in return for services performed or (2) payment by the employer or his agent to an employee of wages at a rate less than that agreed to by the employee or by any authorized person or organization legally acting on his behalf." Conn. Gen. Stat. § 31-73(a).

fee or "rent" after each set or shift at which they performed, in violation of Connecticut law. D'Antuono v. C & G of Groton, et al., AAA No. 11-160-02069 (June 17, 2013) (Zakarian, A.).

Defendants attempt to justify the Lease through the common law principle that parties are free to contract for whatever terms on which they may agree. Holiday Hill Holdings v. Lowman, 226 Conn. 748, 755 (1993). This argument is unavailing since the inherent purpose of the Lease is to evade the state and federal statutory prohibitions against making an end run around an employer-employee relationship by characterizing it as a lease. The parties cannot contract to accomplish a goal which is prohibited by law. Parente, 87 Conn. App. 235 (2005). Agreements formed or "made to facilitate, foster, or support patently illegal activity . . . [are] illegal as against public policy." (Internal quotation marks omitted; citations omitted.) Id. at 250.

Further evidence of the Lease's improper purpose are the contingency provisions which seek to hold the plaintiffs accountable for all entertainment fees collected by them while working at the club in the event that they are found to be employees and not independent contractors. See Paragraph 14B-C. If the plaintiffs are employees and not independent contractors, the Lease calls for the reimbursement to the club of all entertainment fees by the plaintiffs, and the assessment of such fees as service charges entitling the club to full wage credit for all fees retained by the plaintiffs. See Id. These provisions effectively penalize the plaintiffs for being found to be employees and serve to discourage dancers from asserting their employee status. The deterrent effect of these provisions becomes apparent in the face of the plaintiffs' testimony that they made more money through tips than they would have made if they were paid hourly minimum wages. There is also no contingency provision which provides for the reimbursement of House fees

paid to the club by the plaintiffs for rent or to the DJ, further evidencing the punitive nature of these provisions.

Accordingly, it is clear that the inherent purpose of the Lease is to avoid the obligations of employers to their employees established by Connecticut and federal employment law. The Lease's contingency provisions which apply in the event of an employer-employee relationship also serve to discourage dancers from asserting their right to challenge their employment status. For these reasons, I find that the Lease is unlawful and unenforceable. Even though the contract is unenforceable as against public policy, I nevertheless review the different contractual provisions relied upon by the defendants.

III. Credit for Tips or Service Charges

a. The Tip Credit Requirements

Section 3(m) of the FLSA permits an employer to take a tip credit towards its minimum wage obligation for tipped employees. An employer must strictly adhere to the statutory notice requirements if it wants to claim the credit. Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 934 (2d Cir. 2013). Employers must provide advance oral or written notice to tipped employees of the use of the tip credit before claiming it. 29 C.F.R. § 531.59(b). Such notice requires employers to provide their employees with certain enumerated disclosures.[6] That an employer may have "had no occasion to address the tip-credit treatment with its dancers upon hiring" because it mischaracterized employees as independent contractors is not a defense to its failure to provide the required disclosures. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d at 933.

[6] These disclosures include: "The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section." 29 C.F.R. § 531.59(b).

The defendants argue that FLSA section 3(m) tip credits may be claimed towards the minimum wage obligation. Under the facts of this case, I conclude that the defendants are not entitled to credit for tips received by the plaintiffs under the FLSA. Even if the Lease were enforceable, the proper statutory procedures were not followed. The record in this case is clear that the defendants failed to provide the required statutory notice to the plaintiffs that defendants would be claiming tip credit.

The only mention in the Lease of the treatment of tips as credit towards wages is in Paragraph 14 which provides that, contingent on a finding that the plaintiffs are employees and not independent contractors, all entertainment fees would be deemed service charges entitling the defendants to credit for all fees retained by the plaintiffs. This provision is deficient under the FLSA, which requires an enumerated list of disclosures which the employer must give to a tipped employee before the tip credit can be taken by the employer. *See* n. 6. Having failed to adhere to section 3(m)'s disclosure requirements, the defendants cannot now claim the tip credit they seek.

b. Service Charge Credit Requirements

The Department of Labor regulations implementing the FLSA distinguish a "tip" from a "service charge." While a tip is a gift or gratuity for some service performed (29 C.F.R. § 531.52), a service charge is a "compulsory charge for service . . . imposed on a customer by an employer's establishment." 29 C.F.R. § 531.55(a). Service charges are not considered tips when they are included in the employer's gross receipts for purposes of the FLSA. 29 C.F.R. § 531.55(b). "Services charges must be distributed *by the employer* in order to count toward wages." (emphasis in original) Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d at 929; 29 C.F.R. § 531.55(b). The expectation is that such services are to be distributed by the employer out of its gross receipts since it serves to advance the FLSA's goal that

employees are paid. Rick's Cabaret Int'l, Inc., 967 F. Supp 2d at 929. This process of "[r]equiring that service charges pass through the employer's gross receipts guarantees that the employer takes responsibility for its employees' wages." Id.

In Rick's Cabaret Int'l, Inc., supra, the defendant gentlemen's club which employed the plaintiff dancers argued that the performance fees it charged patrons should have been counted towards its wage obligations. The performance fees were paid to dancers by patrons for each personal dance, and for any performance in a secluded area in the club. Id. at 927. The fees were fixed non-negotiable charges set by the defendant-employer, and patrons could tip dancers more, but pay no less, than the fixed fee set. Id. The club argued that these fees were mandatory service charges, not tips, and under the FLSA, could be used to offset the club's duty to pay minimum wage. Id. The court disagreed, holding that because the performance fees were not recorded in gross receipts and were not distributed to the plaintiffs by the club, that they could not be used to offset the defendants' wage obligations. Id. at 929.

The defendants in this case point to Paragraph 13 of the Lease to support their assertion that the entertainment fees should be deemed service charges entitling them to full wage credit for fees retained by the plaintiffs. The defendants' argument is without merit. The Entertainment fees earned by the plaintiffs cannot be considered "service charges" under the FLSA and cannot be used to satisfy the defendants' wage obligations. As in Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d at 929-32, the record in this case does not support a finding that the entertainment fees garnered by the plaintiffs were recorded in the club's gross receipts. In her testimony, Ms. England testified that the club did not keep a record of the gratuities earned by the plaintiffs, evidencing the fact that the entertainment fees are not

service charges under the FLSA. Therefore, the defendants are not entitled to credit for that portion of fees the plaintiffs collected and retained from patrons for personal performances.

IV. Statute of Limitations

The next issue in this matter is whether the two-year statute of limitations[7] limits the plaintiffs' recovery to the years April 2013 through April 2015. The plaintiffs insist that the limitation period should be extended back to 2012 due to the "willful" misconduct of the defendants. "A willful violation means that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Id. (internal quotation marks and citations omitted). A plaintiff must show "more than that defendant should have known it was violating the law. Should have known implies a negligence or reasonable person standard. Reckless disregard, in contrast, involves actual knowledge of a legal requirement, and deliberate disregard of the risk that one is in violation." Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d at 937-38. "Mere negligence or unreasonableness on the part of the employer is insufficient." (Citations omitted; internal quotation marks omitted) Id. at 937.

In this matter the defendants sought legal advice and were counselled that the Lease Agreement complied with relevant laws. The fact that advice is inconsistent with this award does not render such recommendations as having been made in bad faith. I conclude that the record does not support a finding of reckless regard by the defendants of the relevant laws. Accordingly, plaintiffs' claims are limited to the two-year period from the date the complaint was served upon the defendants[8] on April 14, 2015 back to April 14, 2013.

V. Damages

[7] Under Connecticut wage laws the statute of limitations for claims is two years. Conn. Gen. Stat. § 52-596. Under federal law, the statute of limitations is also two years for an FLSA claim, and in the event of a willful violation, three years. 29 U.S.C. § 255(a).

[8] There is discrepancy in the pleadings as to the start date of the statute of limitations period. I find that the statute of limitations window runs back two years from the date of service of the Writ, Summons and Complaint upon the defendants by State Marshal Richard A. Orr on April 14, 2015.

a. Recordkeeping Obligations

State and Federal laws also require defendants to keep and maintain wage and hour records for each employee. Employers in Connecticut are required to keep a true and accurate record of hours worked and wages paid to each employee for a period of three years at the place of employment. Conn. Gen. Stat. § 31-66. Federal law requires employers subject to the FLSA, such as the defendants, to maintain and preserve payroll records and information about each employee, including their workweek schedule, overtime hours, and earnings. 29 C.F.R. §§ 516.2, 516.5-6. The parties stipulate that defendants never provided them any documentation or information which would reflect that such requisite records were kept. The plaintiffs' testimony did not refer to any practice of recordkeeping of hours worked or money earned on their part.

b. Factual Basis for Calculation of Damages

The defendants claim that there was a check-in process for the plaintiffs at the start of each shift. This process entailed the photocopying of the identification card of each dancer at check-in onto a sheet of paper, which would serve as a time stamped "punch card." From this de facto "punch card" the administrative staff would derive information from it to produce a daily business recap onto a master listing produced for each day of business which also included information unrelated to employee records, such as the sales of liquor, which was then kept in binders. Defendants' record keeper Randi England testified it was the practice of the business to discard the "punch cards" after the daily business recap was produced. Both parties also testified that after some time, a biometric clock-in system was later implemented in which the plaintiffs would enter their fingerprints before starting their shifts. Ms. England testified that the early records for this biometric system do not exist due to a system malfunction. Nonetheless, the defendants argue that the damages sought by

the plaintiffs are too speculative, and that the employer has the right to present evidence of the precise amount of work performed or to negate the reasonableness of the inference to be drawn from the employee's evidence. Reich v. SNET, 121 F.3d 58, 69 (2d Cir. 1997).

The plaintiffs conversely argue that the defendants' records are violative of wage and hour law, and thus the plaintiffs are entitled to an adverse inference and allowed to substitute their own testimony about their hours worked.

I conclude that the defendants' record keeping was inadequate and incomplete. Accordingly, in calculating plaintiffs' damages I have necessarily relied on both the plaintiffs' testimony and the partial records of the defendants. *See*, Kuebel v. Black & Decker, Inc., 643 F.3d 352, 362 (2d Cir. 2011) ("an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.") (Citation omitted; internal quotation marks omitted.); Reich v. SNET, 121 F.3d at 69 ("the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence . . . . Should the employer fail to produce such evidence, the court may award damages, even though the result is only approximate.") (Citation omitted; internal quotation marks omitted.).

c. Calculation of Damages

Having concluded that the two-year statute of limitations applies to the claimants in this case, the next issue is assessment of damages for the years April 14, 2013- April 14, 2015 for each of the individual plaintiffs. As previously noted, this assessment is made difficult by the absence of complete and reliable records in the possession of the defendants and by the understandable reality that the plaintiffs themselves do not have accurate records

of the dates and hours they performed at Keepers. Despite these limitations the law recognizes that a trial court or arbitrator retains the responsibility to calculate as accurately as possible, based on all of the available evidence, the hours of employment of the claimants. *See*, Kuebel, 643 F.3d 352, 362 (2d Cir. 2011) ("where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes . . . [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work, as such a result would be contrary to the remedial nature of the FLSA.") (Citations omitted; internal quotation marks omitted.). I note that the claims of the plaintiffs and defendants are wildly conflicting and are not subject to reconciliation. In arriving at the following awards, I note that in many instances the plaintiffs' trial testimony was inconsistent with certain aspects of their deposition testimony. I also note that the failure of the defendants to create and/or maintain accurate records also creates legitimate questions of its credibility. Accordingly, the following awards are entered as to the plaintiffs.

Crystal Horrocks

Despite her claim that in 2013 and 2014 she worked 48 hours per week, I conclude that she worked on average 30 hours per week, none of which involved overtime. I conclude that her period of employment was from October 30, 2013 to the date her complaint was served on April 14, 2015. Applying a "straight-line" calculation of 30 hours per week multiplied by the then minimum wage for each of the years in question the following damages are calculated:

Wages:

2013 30 hours per week for 9 weeks at $8.25 per hour	$ 2,227.50
2014 30 hours per week for 46 weeks at $8.70 per hour	$12,006.00
2015 30 hours per week for 15 weeks at $9.10 per hour	$ 4,095.00
Total Wages	$18,328.50

House and DJ Fees:

2013 36 shifts

2014 184 shifts

2015 60 shifts

280 shifts worked with $50 in fees paid per shift[9]

Total Fees	$14,000.00
TOTAL DAMAGES:	$32,328.50

[9] I conclude that the average fees assessed by the club per shift for each dancer is $50.

Jacquelyne Green

I conclude that Ms. Green worked on average 24 hours per week. I conclude that the period of Ms. Green's employment which falls within the statute of limitations period is April 14, 2013 to January 30, 2015.[10] Applying a "straight-line" calculation of 24 hours per week multiplied by the then minimum wage for each of the years in question the following damages are calculated:

Wages

2013 24 hours per week for 37 weeks at $8.25 per hour	$ 7,326.00
2014 24 hours per week for 52 weeks at $8.70 per hour	$10,857.60
2015 24 hours per week for 4 weeks at $9.10 per hour	$ 873.60
Total Wages	$19,057.20

House and DJ Fees

2013 111 shifts

2014 152 shifts

2015 12 shifts

275 shifts worked with $50 in fees paid per shift

Total Fees	$13,750.00
TOTAL DAMAGES:	$32,807.20

[10] Testimony and evidence submitted by Ms. Green demonstrate that she started work before April 14, 2013. However, since the statute of limitations only extends back to April 14, 2013 in this case, the calculation of her damages for wages and fees owed begins on April 14, 2013.

Dina Coviello

I conclude that Ms. Coviello worked on average 15 hours per week, for 35 weeks in 2013, and 30 weeks in 2014. I conclude that her period of employment which falls within the statute of limitations period is April 14, 2013[11] to May 7, 2013, that she took a break from employment at Keepers and resumed work again from August 2013 to March 2014, a total period of 33 weeks. Applying a "straight-line" calculation of 15 hours per week multiplied by the then minimum wage for each of the years in question, the following damages are calculated:

Wages:

2013 15 hours per week for 25 weeks at $8.25 per hour	$3,093.75
2014 15 hours per week for 8 weeks at $8.70 per hour	$1,044.00
Total Wages	$4,137.75

House and DJ Fees:

2013 50 shifts

2014 16 shifts

66 shifts worked with $50 in fees paid per shift

Total Fees	$3,300.00
TOTAL DAMAGES:	$7,437.75

Yaritza Reyes

I conclude that Ms. Reyes worked on average 18 hours per week. I conclude that her period of employment which falls within the statute of limitations period was from

[11] Testimony and evidence submitted by Ms. Coviello demonstrate that she started work before April 14, 2013. However, as with Ms. Horrocks, the calculation of her damages for wages and fees owed begins on April 14, 2013.

April 14, 2013[12] to February 28, 2014. Applying a "straight-line" calculation of 18 hours per week multiplied by the then minimum wage for each of the years in question the following damages are calculated:

Wages

2013	
18 hours per week for 37 weeks at $8.25 per hour	$ 5,494.50
2014	
18 hours per week for 8 weeks at $8.70 per hour	$ 1,252.80
Total Wages	$ 6,747.30

House and DJ Fees

2013 111 shifts

2014 24 shifts

135 shifts worked with $50 in fees paid per shift

Total Fees	$ 6,750.00
TOTAL DAMAGES:	$13,497.30

Sugeily Ortiz

I conclude that Ms. Ortiz worked on average 40 hours per week. I conclude that her period of employment which falls within the statute of limitations period was from April 14, 2013[13] to December 1, 2013, a period of 33 weeks. Applying a "straight-line" calculation of 40 hours per week multiplied by the then minimum wage for each of the years in question the following damages are calculated:

Wages

[12] Testimony and evidence submitted by Ms. Reyes demonstrate that she started work before April 14, 2013. However, as with Ms. Green and Ms. Coviello, the calculation of Ms. Reyes's damages for wages and fees owed begins on April 14, 2013 based on the two year Statute of Limitations.

[13] As with the other plaintiffs who started work before the statute of limitations period, I conclude that the calculation of Ms. Ortiz's damages also begins on April 14, 2013.

2013
40 hours per week for 33 weeks at $8.25 per hour $10,890.00

House and DJ Fees

132 shifts worked with $50 in fees paid per shift $ 6,600.00

TOTAL DAMAGES: $17,490.00

Zuleyma Lopez

I conclude that based on the very limited evidence presented with respect to damages, Ms. Lopez is entitled to an award of $5,000.00.

Dalynna Seoung

I conclude that based on the very limited evidence presented with respect to damages, Ms. Seoung is entitled to an award of $5,000.00.

VI. Liquidated Damages

I decline to award double damages concluding that the record does not demonstrate that the defendants lacked a "good faith belief" that it was underpaying the plaintiffs.

VII. Attorneys' Fees and Costs

The FLSA (29 U.S.C. § 216(b)) and Connecticut law (Conn. Gen. Stat. § 31-72) permit the recovery of attorneys' fees. Neither body of law requires a showing of willfulness for an award of attorneys' fees. All that is required for recovery of attorneys' fees is a violation of wage and hour laws.

Accordingly, having found that the defendants are in violation of wage and hours laws, the plaintiffs are entitled to the recovery of their attorneys' fees and the costs related to bringing this action. Upon reviewing the affidavit of attorneys' fees submitted by plaintiffs' counsel and the supporting documents, I find counsel's time and hourly rate to be reasonable and award $85,000.00 in fees and $2,981.16 in costs.

VIII. Conclusion

A plaintiffs' award is entered in the amount of $113,560.75 plus attorneys' fees in the amount of $85,000.00 and costs of $2,981.16.

SO ORDERED.

Robert L. Holzberg, Judge (Ret.)
Arbitrator
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702
Tel: 860-424-4300

DOCKET NO.: CV 15-6054684

CRYSTAL HORROCKS, ET AL. : SUPERIOR COURT

V. : JUDICIAL DISTRICT OF NEW HAVEN

KEEPERS, INC., ET AL. : OCTOBER 2, 2020

MEMORANDUM OF DECISION RE:
PLAINTIFFS' MOTION TO CONFIRM AND DEFENDANTS' MOTION TO VACATE ARBITRATION AWARD (#126.00 AND #127.00)

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs Crystal Horrocks, Yaritza Reyes, Dina Danielle Caviello, Jacqueline Green, Sugeily Ortiz and Zuleyma Bella Lopez,[1] brought suit against the defendants, Keepers, Inc. and Joseph Regensburger, for alleged violations of the relevant state and federal minimum wage and overtime laws. As alleged in the plaintiffs' complaint, each of the plaintiffs worked as an exotic dancer at Keepers Gentlemen's Club located in Milford. This establishment is owned and operated by the defendants. The plaintiffs allege that

[1] The arbitration award at issue also granted damages to Dalynna Seoung. This individual is not listed as a plaintiff in the summons or the complaint. It is unclear how she became a participant in this case. Nevertheless, as the defendants do not raise this issue, it need not be addressed by the court.

during their time working for the defendants, they were improperly characterized as independent contractors as opposed to employees. According to the plaintiffs, this improper employment relationship has caused them, inter alia, to be unable to obtain needed workers' compensation benefits, as well as not be paid the appropriate minimum wage and overtime pay. The plaintiffs also contend they were illegally forced to pay the defendants certain gratuities that they received from customers. Accordingly, the plaintiffs' eight-count complaint alleges the following causes of action: (1) count one– failure to pay minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206; (2) count two– failure to pay overtime in violation of the FLSA, 29 U.S.C. § 207; (3) count three– unlawful deductions from wages and/or gratuities in violation of the FLSA; (4) count four– failure to pay minimum wage in violation of General Statutes § 31-60; (5) count five– failure to pay overtime in violation of General Statutes § 31-76b; (6) count six– unlawful deductions from wages in violation of General Statutes § 31-71e; (7) count seven–unjust enrichment and (8) count eight– breach of implied contract.

On May 26, 2015, the defendants filed a motion to dismiss and/or stay this action (docket entry number 101) on the ground that the employment relationship between the parties was governed by an entertainment lease agreement that contained a mandatory

arbitration clause.[2] The court, *Wilson, J.*, denied the motion to dismiss (docket entry number 101.01) on October 13, 2015, but it also ordered a stay of the proceedings pending arbitration on January 4, 2016 (docket entry number 104). Following an order by this court, *Abrams, J.*, on November 29, 2016 (docket entry number 111.10) compelling arbitration, the parties proceeded to an arbitration before retired Superior Court judge Robert Holzberg. On July 18, 2019, Judge Holzberg issued his initial arbitration award wherein he determined that the plaintiffs were appropriately characterized as employees and opposed to independent contractors.[3] Subsequently, on March 17, 2020, Judge Holzberg issued a

[2] The arbitration provision contained in the entertainment lease agreement reads in relevant part: "23. Arbitration/waiver of Class and Collective Actions/Attorney Fees and Costs. A. Binding Arbitration. Any and all controversies between the Entertainer and Club, regardless of whether such claims sound in contract, tort, and/or based upon a federal or state statu[t]e, shall be exclusively decided by binding arbitration held pursuant to and in accordance with the Federal Arbitration Act ('FAA'), and shall be decided by a single neutral arbitrator agreed upon by the parties, who shall be permitted to award, subject only to the restrictions contained in this Paragraph 23, any relief available in court. All parties waive any right to litigate such controversies, disputes, or claims in a court of law, and waive the right to trial by jury."

[3] On July 19, 2019, the plaintiffs filed a preliminary application to confirm this arbitration award (docket entry number 114). No action was taken on it by the court.

further arbitration award[4] where he determined, inter alia, that the entertainment lease agreement was illegal and unenforceable because it was an attempt to circumvent statutory wage and hour requirements, and as a result, the plaintiffs were entitled to be paid the appropriate minimum and overtime wage for the hours they worked for the period between April 14, 2013 to April 14, 2015.[5] Judge Holzberg awarded the plaintiffs $113,560.75 in damages.[6] Judge Holzberg further denied the plaintiffs' request for double liquidated damages because he found the defendants acted with a good faith belief they were complying with the law, but he also gave the plaintiffs' $85,000 in attorney's fees and $2,981.16 in costs.

On March 17, 2020, the plaintiffs filed an application to confirm both the July 18, 2019 and the March 17, 2020 arbitration awards (docket entry number 126). The defendants

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[4] Judge Holzberg's March 17, 2020 arbitration award corrected an earlier award dated March 12, 2020, that contained a computation error with respect to the proper amount of damages.

[5] Judge Holzberg did not award any damages for work undertaken before April 14, 2013 due to the applicable statute of limitations.

[6] This total award was broken down as follows: (1) Horrocks– $32,328.50; (2) Green– $32,807.20; (3) Coviello– $7,437.75; (4) Reyes– $13,497.30; (5) Ortiz– $17,490; (6) Lopez– $5,000 and (7) Seoung- $5,000.

filed a motion to vacate the arbitration awards on April 7, 2020 (docket entry number 127). The court heard oral argument remotely on both motions on August 3, 2020.

DISCUSSION

"Our Supreme Court has for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . Since the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it, and only upon a showing that it falls within the proscriptions of § 52-418 of the General Statutes, or procedurally violates the parties' agreement will the determination of an arbitrator be subject to judicial inquiry." (Internal quotation marks omitted.) *Doctor's Associates, Inc.* v. *Windham*, 146 Conn. App. 768, 774-75, 81 A.3d 230 (2013). Accordingly, under this state's

statutory scheme governing arbitration, "[t]he court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419." General Statutes § 52-417.

"Our courts have held that claims of manifest disregard of the law fall within the statutory proscription of § 52-418 (a) (4). [A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside . . . because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. . . . [T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Zelvin* v. *JEM Builders, Inc.*, 106 Conn. App. 401, 413, 942 A.2d 455 (2008). "Under this highly deferential standard, the defendant has the burden of proving three elements, all of which must be satisfied in order for a court to vacate an arbitration award on the ground that the [arbitrator] manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and

clearly applicable." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 102, 881 A.2d 139 (2005).

The defendants argue that Judge Holzberg's arbitration awards manifestly disregarded the law in three different ways. First, the defendants contend that when Judge Holzberg determined that the entertainment lease agreement was void and unenforceable as a violation of public policy, that the arbitration clause found within that contract was necessarily also rendered invalid. As the arbitrator's powers arise out of the parties' agreement, the defendants contend that if the underlying contract is not enforceable, then the arbitration provision found within it also becomes invalid. Second, the defendants argue that Judge Holzberg's award of attorney's fees must be vacated because he relied on the current version of § 31-72 as opposed to the iteration of the statute that was in existence between April, 2013 and April, 2015. According to the defendants, the earlier version of § 31-72 prohibited an award of attorney's fees in instances where the defendants did not act in bad faith when they underpaid wages. Finally, the defendants contend that "the arbitrator disregarded the law that the defendants have the right to present evidence of the precise amount of work the plaintiffs performed." The defendants believe it was incorrect for Judge Holzberg to rely on the oral testimony of the plaintiffs regarding how much time they worked as opposed to the defendants' written records. Therefore, the defendants argue that

the damages awarded by Judge Holzberg were too speculative. The court will address each of these arguments individually.[7]

The defendants' first claimed basis for granting their motion to vacate is governed by the Connecticut Supreme Court's decision in *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 919 A.2d 1002 (2007). In *C.R. Klewin*, the Supreme Court examined, inter alia, the issue of whether "a contract containing an arbitration clause is void ab initio on the ground of illegality falls within the exclusive jurisdiction of the court, and not the arbitration panel." Id., 70. The defendant had "argue[d] that a declaration that a contract is void ab initio logically would render void an arbitration clause contained in that contract, thereby depriving the panel of subject matter jurisdiction over the dispute and the trial court of jurisdiction to confirm any resulting award." Id., 70-71. Quoting the United States Supreme Court's decision in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 126 S.Ct.

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[7] Although the plaintiffs did orally argue in opposition to the defendants' motion to vacate the arbitration awards, they did not file any written opposition to said motion. Given that it was filed before the defendants' motion to vacate, the plaintiffs' application to confirm does not set forth any substantive arguments in opposition to the defendants' positions. During the August 3, 2020 hearing before this court, however, the plaintiffs indicated their belief that the law dictates that the arbitration provision should stand even if the rest of the contract is deemed to be invalid.

1204, 163 L.Ed.2d 1038 (2006),[8] our Supreme Court concluded that: "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. . . . Applying those holdings, the [United States Supreme] [C]ourt concluded that, because respondents challenge the [a]greement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 75.

C.R. Klewin Northeast, LLC and *Buckeye Check Cashing, Inc.* definitively establish that the legal validity of the underlying contract and arbitration provision are separate issues. In the present case, the plaintiffs had previously argued that the arbitration provision was unenforceable due to procedural and substantive unconscionability. Judge Wilson rejected this argument in her January 4, 2016 memorandum of decision denying the defendants'

[8] "General Statutes § 52–408 is similar to § 2 of the federal Arbitration Act, 9 U.S.C. § 1 et seq. . . . [Therefore,] [i]n construing a Connecticut statute that is similar to federal law, [this court is] guided by federal case law." (Citation omitted.) *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 73 n.6, 856 A.2d 364 (2004).

motion to dismiss/stay.[9] Therefore, the arbitration clause of the subject contract has already been judicially declared valid and was presumptively enforceable during the arbitration proceedings. Accordingly, although Judge Holzberg later determined that the substantive portions of the entertainment lease agreement between the parties were void and unenforceable, that decision does not apply to the arbitration clause itself. Given that an arbitration provision is severable from its underlying contract and that Judge Wilson has already determined that the arbitration clause was legally enforceable, the fact that Judge Holzberg declared the entertainment lease agreement illegal does not invalidate the arbitration clause and make the case no longer arbitrable. Therefore, the court rejects this argument as a valid basis to grant the defendants' motion to vacate.

Next, the court will address the defendants' argument that the arbitration awards should be vacated because Judge Holzberg awarded attorney's fees even though he found

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[9] Specifically, Judge Wilson held that "[t]he plaintiffs have failed to present the court with specific evidence of procedural and substantive unconscionability surrounding the entertainment lease agreement. Rather, the plaintiffs rely on federal case law in jurisdictions that are less favorable to arbitration than Connecticut and not within the Second Circuit, and accordingly, are not binding nor persuasive on this court. Thus, the arbitration agreement is not procedurally or substantively unconscionable and therefore it does not violate public policy and is not void as a matter of law." *Horrocks* v. *Keepers, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-15-6054684-S (January 4, 2016, *Wilson, J.*) (61 Conn. L. Rptr. 599, 603). The court considers this decision the law of the case.

the defendants did not act in bad faith. The basis for this contention is that Judge Holzberg relied on the current version of § 31-72 instead of the earlier iteration that required a finding of bad faith in order to award attorney's fees.[10] Importantly, however, in his March 17, 2020 arbitration award, Judge Holzberg states: "The FLSA (29 U.S.C. § 216 (b)) and Connecticut law (. . . § 31-72) permit the recovery of [attorney's] fees. Neither body of law requires a showing of willfulness for an award of [attorney's] fees." Accordingly, Judge Holzberg clearly also relied on federal law as a basis for his attorney's fees award. 29 U.S.C. § 216 (b) provides, in relevant part: "Any employer who violates the provisions of section 206 [minimum wage] or section 207 [overtime] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime

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[10] Prior to an amendment to § 31-72 that took effect on October 1, 2015, our Supreme Court had held that "it is well established . . . that it is appropriate for a plaintiff to recover attorney's fees, and double damages under [§ 31–72], only when the trial court has found that the defendant acted with bad faith, arbitrariness or unreasonableness." (Internal quotation marks omitted.) *State* v. *Lynch*, 287 Conn. 464, 475 n.10, 948 A.2d 1026 (2008). The current version of § 31-72, however, clearly states that when an employer fails to pay its employee the proper amount the employee "**Error! Main Document Only.**shall recover, in a civil action, (1) twice the full amount of such wages, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of wages was in compliance with law, the full amount of such wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court." (Emphasis added.)

compensation . . . . The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." This statutory language was in existence during the period between April, 2013 and April, 2015. Under federal law, "[t]he payment of attorney's fees to employees prevailing in FLSA cases is mandatory. 29 U.S.C. § 216 (b). The amount of the attorney's fees, however, is within the sound discretion of the trial court." *Burnley v. Short*, 730 F.2d 136, 141 (4th Cir. 1984). The plain language of the statute does not require a showing of bad faith or wilfulness on the part of the defendants. See, e.g., *McQueen* v. *Licata's Seafood Restaurant*, United States District Court, Docket No. Civ. A. No. 91–1461 (E.D. La. March 30, 1992) (1992 WL 73322) (noting that "[a]n award of attorney's fees to the prevailing party in a FLSA action is mandatory" even though "one could draw sufficient inferences from . . . [the] evidence to find good faith [on the part of the defendant employer]"). Accordingly, because an award of attorney's fees is mandatory when the plaintiff prevails under 29 U.S.C. § 216 (b), the court determines that Judge Holzberg acted properly when he gave the plaintiffs attorney's fees.

Finally, the court will discuss the defendants' third argument in favor of granting their motion to vacate. Although the defendants attempt to frame this portion of their motion as an attack on the overly speculative nature of Judge Holzberg's damages

calculation, in reality, the defendants believe that Judge Holzberg erred when he credited the plaintiffs' oral testimony over certain written documentation offered by the defendants. "Our Supreme Court has determined that in reviewing questions of fact in arbitration proceedings, a reviewing court must determine whether there is substantial evidence in the record to support the arbitrators' findings of fact and whether the conclusions drawn from those facts are reasonable. . . . The limited scrutiny with which [a court] review[s] an arbitration panel's findings of fact dictates that it is . . . [not] the function of the trial court . . . to retry the case or to substitute its judgment for that of the [arbitration panel]." (Emphasis omitted; internal quotation marks omitted.) *Enfield* v. *AFSCME Council 4, Local 1029*, 100 Conn. App. 470, 477, 918 A.2d 934, cert. denied, 282 Conn. 924, 925 A.2d 1105 (2007). In his March 17, 2020 arbitration award, Judge Holzberg "conclude[d] that the defendants' record keeping was inadequate and incomplete. Accordingly, in calculating [the] plaintiffs' damages I have necessarily relied on both the plaintiffs' testimony and the partial records of the defendants." With this statement, Judge Holzberg indicates that he examined the defendants' attendance records but he found that they were not completely accurate. Therefore, he also relied on the plaintiffs' oral testimony in order to determine a complete total of the number of hours that they worked. This finding is more than substantial evidence to support Judge Holzberg's damages calculations, and it is not the role of this

court to substitute its judgment for that of the arbitrator. Consequently, the court also rejects this argument as a valid basis to grant the defendants' motion to vacate.

CONCLUSION

The court hereby denies the defendants' motion to vacate the arbitration awards (#127) and it grants the plaintiffs' application to confirm same (#126) for the reasons set forth herein.

James W. Abrams, Judge

INDEPENDENT ENTERTAINER COALITION

OVERVIEW

The Independent Entertainer Coalition is the largest established trade group for Exotic Dancers in the United States. Established in 2015 by three exotic dancers from Los Angeles, our organization and its charter have grown to over 2,800 signees nationwide!

Our organization was formed largely in response to the anti-worker movements throughout the country that seek to strip away the worker's choice of deciding her employment status. Generally initiated by radical zealots, ex-dancers, and ambulance-chasing attorneys, these efforts and their associated lawsuits have stripped exotic dancers of their customary choice and instead enslaved them to the tyranny of employment.

BACKGROUND

For nearly five decades, exotic dancers in the United States have rightfully performed as Independent Contractors in nearly every state. Most adult nightclubs offer entertainers the choice between working as a W-2 Employee or an Independent Contractor. A W-2 employee, a classification with which most are familiar, is reserved for most professions. An Independent Contractor, on the other hand, is usually a status reserved for special talent, temporary workers, the self-employed, artists, etc... all terms that accurately describe the exotic dancing profession. Further, the unique circumstances of the profession have always lent themselves in favor of the independent classification.

TODAY'S ISSUES

Over the last ten years, this pro-entertainer system has been under attack from two enemies.

First, state governments have always been opposed to the Independent Contractor status, despite exotic dancers having been specifically approved as Independent Contractors by the federal government. Why? Money! State governments tax both the employer and employee under Employee classification, whereas only one party is taxed under Independent status. Greedy politicians, like those in California who have led the state to financial ruin, need to excessively tax hard-working single mothers to make government ends meet.

Second, ambulance-chasing attorneys have built a profitable enterprise out of suing innocent adult nightclubs in relation to these issues. In short, strip clubs make bad victims, and as such, have difficulty defending themselves in so-called "misclassification" lawsuits. These hack-job failed lawyers sue the clubs and force these small business owners to pay millions in settlements. Naturally, the plaintiff is usually an entertainer who retired 10 years ago. Her attorney makes millions in legal fees while the entertainers s/he claims to represent make next-to nothing.

This brings us to the present! Clubs have suffered at the hands of the State and the ambulance-chasing lawyers so much over the past few years that many have decided to "throw in the towel" and simply force entertainers to become employees against their will. To worsen matters, the authoritarian California Supreme Court recently issued an unconstitutional decision, Dynamex vs Superior Court, which has severely exacerbated these problems. In the State of California and in many other areas, entertainers no longer have a choice or say in determining their employment status.

OUR POSITION

For the reasons explained below, virtually all entertainers have historically selected contractor status.

Independent Contractor status has offered numerous benefits and protections to entertainers that are not available under the employee model:

1. Independent Contractors set their own schedules, or maintain no schedule at all. Employees must work a schedule decided by management.

2. Independent Contractors can perform at multiple clubs or travel the country performing at different clubs. Employees are obligated to work at only one club.

3. Independent Contractors enjoy tax deductions not offered to employees. Employees are entitled to virtually no tax deductions.

4. Independent Contractors receive cash income nightly. Employees must wait two weeks for all earnings to arrive via paycheck.

5. Independent Contractors control their own tax payments. Employees must report all tips earned and have taxes withheld on those tips and all other earnings.

6. Independent Contractors enjoy the anonymity that sex work necessitates. Employees are effectively part of a giant government-owned sex worker database that police can use to target and harass them.

7. Independent Contractors have contracts with the clubs wherein they can only be terminated for certain reasons with required notice. Employees can be terminated at anytime for no reason at all.

8. Independent Contractors can perform as much or as little as she desires. Employees are limited to 40 hours (or less) per week.

9. Independent Contractors retain creative control over their performances. Employees have their costumes, music, and routines determined by management.

10. Independent Contractors choose the customers for whom they dance. Employees must dance for whomever management selects on demand.

11. Independent Contractors control their degree of nudity. Employees can be forced to be nude in any lawful fashion that management decides.

12. Independent Contractors are contractually entitled to a large share of the dance sales. Employees own none of the dance sales, and the clubs only have to pay them a minimum wage.

13. Independent Contractors own all of their tips received. Employees can be forced to participate in a "tip pool."

14. Independent Contractors can take as many breaks for any duration as they desire. Employees only receive short, limited breaks as mandated by law.

15. Independent Contractors would never give free dances. Employees are required to follow management's instructions, which may include giving free dances.

16. Independent Contractors work for themselves and don't have to follow direction from management. Employees must do as management instructs, which may include other duties, like cleaning, serving, or promoting.

17. Independent Contractors are free to come and go as they please. Employees must work a minimum number of hours per day and meet a rigid sales quota.

18. Independent Contractors can perform regardless of other factors. Employees can only work if there are "shifts available" and management permits.

CONSEQUENCES

First, adult nightclubs all over the State of California have recently closed because they could not afford the "employee model." The simple fact is that smaller clubs simply cannot financially sustain having so many employees. This results in immediate job loss for everyone involved.

Second, exotic dancers have become enslaved to employment. Their choice and say in the matter has been viciously stolen from them without due process.

Third, this model has resoundingly diminished the effective earnings of exotic dancers to very unappealing levels. At clubs that have forced employee status on its entertainers, entertainers are making 50-70% less money than they were before.

DEMAND

The Independent Entertainer Coalition has one simple demand.

Allow workers, at least those who work as exotic dancers, to continue the decades-long, accepted, and desirable practice of choosing their own employment classification status.

Let those who want to work under the foolish zealot's "employee model" do so, and let those who wish to break free from employment slavery preserve their natural right to remain Independent Contractors.

CALL TO ACTION

So what can you do? Call your local state legislator. Call the governor. Tell your club managers you want your own choice. Use the Contact Us form below to join our cause and get a link to sign our charter.

CONCLUSION

We live in a great county. Citizens can CHOOSE their own politicians. Parents can CHOOSE how to raise their children. Women can CHOOSE to have an abortion.

Why not let workers CHOOSE their own classification status?

Contact Form

Fields marked with an * are required

Name *

DN NNH CV-15-6054684 S

CRYSTAL HORROCKS, ET AL	SUPERIOR COURT
VS.	JUDICIAL DISTRICT OF NEW HAVEN
KEEPERS, INC., ET AL	AT NEW HAVEN
	OCTOBER 4, 2017

DEPOSITION OF CRYSTAL HORROCKS

Deposition in the above-entitled action, before Marion Strachman, Notary Public, at The Pellegrino Law Firm, 475 Whitney Avenue New Haven, Ct., on the 4th day of October, 2017, 10:35 A.M.

Marion Strachman
Certified Licensed Reporter
Lic. #00296 203-846-0549

Q And the hours were, approximately, the same?
A Approximately, yes.
Q You can't work after the bar is closed. I get that.
A Right.
Q How about lap dances, were they about the same price for a customer, $20?
A Some of them are thirty.
Q Sometimes thirty?
A Yes.
Q But, in some of those clubs, you would have to share the lap dance fee with the owner?
A Yes, five dollars.
Q Did you have to ever share tips on stage when you worked at the other places?
A No.
Q Did you have to pay the DJ at the other places you worked?
A Sometimes. It depended on which one it was.
Q The--
A The club.
Q You started in October, 2013. Did you

sign an entertainment lease when you got there?

A Yes.

Q What was your understanding of that agreement that you signed?

A Honestly, I didn't really read it. I know you have to sign a contract at every club you work at. I never fully read the whole thing. Just something that I normally do, you sign the application, the contract.

Q I understand you are not a lawyer. What was your understanding of why did they make you sign it?

A As far as I knew it was saying that I work here, it's legal for me to work here, and there's not going to be anything as far as extras. Nothing sexual allowed in the club. That was my understanding of it.

Q Was it your understanding that you were an employee or independent contractor--

A Independent contractor.

Q --when you came to Keepers? And as an independent contractor, your understanding is that you could come to work on any day that you like to?

A And choose my hours. If I wanted to take a break, I could.

Q When you signed this agreement in October, 2013, it didn't require you to come to work Monday, Tuesday, Wednesday, Thursday and Friday?

A No, it did not require me to.

Q So you could choose what days you wanted to work during the weekend or week days?

A Yes, but that would put you on a list, though.

Q I understand. The only requirement they had is that if you were going to work that day, you had to come when the bar was open--

A Yes.

Q --for the day shift, mid-shift, or night shift?

A Yes.

Q Did you expect a salary?

A No.

Q Did you expect to be paid hourly?

A No, I did not.

Q Are you claiming that you should get a salary now from Keepers for the time you worked

Q Did you have a boss at Keepers?
A I assume so, but I never met them.
Q So you didn't have to report to anybody when you went to work?
A I used to talk to the bouncer at the door. Anything, I would just ask the bouncer.
Q So you don't-- Did you deal with anyone other than a bouncer while you worked there?
A When I first started there, there was a lady. I can't remember her name. She is the one that had me sign the contract. After that, I never heard from her.
Q Do you have any records that would reflect the time that you worked the time you're telling me in 2013 and 2014, written records?
A No.
Q Did you file tax returns in 2013?
A I did not.
Q How about 2014?
A No.
Q Do you have a record or have an idea, staying with 2013, of how much money you made working at Keepers in say 2013?
A I have an approximate idea.

Q What is your approximate idea?
A I would make, approximately, $300 a night, a decent night.
Q And, again, so we're clear. I think I know your answer. That would come from two sources, the customers paid you for lap dances, customers that paid you for the VIP room, and tips on stage?
A Yes.
Q So $300 a night. I know that's an average or approximate.
A Yes.
Q What about 2014?
A It would be up to about $300 a night. There would be some nights, I wouldn't make enough to even cover the house fees.
Q I understand it goes up and down. You're giving me what you call an average?
A Yes.
Q Some nights are better and some nights are worse?
A Yes.
Q I get it. In this particular lawsuit that you brought are you seeking an hourly wage?

DN NNH CV-15-6054684 S

CRYSTAL HORROCKS, ET AL	SUPERIOR COURT
	JUDICIAL DISTRICT OF
VS.	NEW HAVEN
KEEPERS, INC., ET AL	AT NEW HAVEN
	OCTOBER 4, 2017

DEPOSITION OF JACQUELINE GREEN

Deposition in the above-entitled action, before Marion Strachman, Notary Public, at The Pellegrino Law Firm, 475 Whitney Avenue New Haven, Ct., on the 4th day of October, 2017, 11:19 A.M.

A Yes.
Q Did you have to tip?
A Not all places had DJ's.
Q But, some places?
A Yes.
Q And you would tip them?
A Yes.
Q Let's just stay with Keepers for a second. You could make money by going on stage and getting tips?
A Yes.
Q And you could make money if you did a lap dance for a customer?
A Yes.
Q Did you ever have to share any of the lap dance money with Keepers?
A No.
Q Did you ever use a VIP room at Keepers ever?
A Yes.
Q How did that work?
A I know that we would pay a certain amount to the house. They would take a certain amount of it. I'm trying to think what the

to be at Keepers in 2012?
A Seven p.m. until 2 a.m.
Q On a weekend?
A Yes.
Q One or two?
A Yes.
Q How about 2013, did you work as much then?
A Yes. I took two weeks off in between all this time.
Q And you worked the night shift in 2013?
A Uh-huh.
Q Yes?
A Yes.
Q And was it an average of $300 a night again?
A Yes, I did pretty good there. Some nights I made more and some nights I made less.
Q Right. You said average. I get it.
A Right.
Q How about 2014?
A Same thing. I averaged $300, $350. I liked Keepers.
Q And you left, you said, 2015. Do you

DN NNH CV-15-6054684 S

CRYSTAL HORROCKS, ET AL	*	SUPERIOR COURT
	*	
VS.	*	JUDICIAL DISTRICT OF
	*	NEW HAVEN
KEEPERS, INC., ET AL	*	AT NEW HAVEN
	*	
	*	OCTOBER 4, 2017

DEPOSITION OF DINA D. CAVIELLO

Deposition in the above-entitled action, before Marion Strachman, Notary Public, at The Pellegrino Law Firm, 475 Whitney Avenue New Haven, Ct., on the 4th day of October, 2017, 11:43 A.M.

Marion Strachman
Certified Licensed Court Reporter
License #00296 203-846-0549

A Yes. The house fee that they take when you first start work.
Q The house fee, I guess.
A Yes. They get--
Q Would you agree with me that if you were to do a lap dance with a customer, you get to keep all the money that the customer gives you?
A Yes.
Q You don't have to share that with Keepers?
A You have to share when you have a room.
Q Okay. I'm not on that yet. Just a regular lap dance--
A Right.
Q --you keep all that money?
A Yes.
Q There's no sharing?
A Right.
Q If you do a VIP room, that's what you're talking about?
A Yes.
Q That's a little bit different?
A Yes.
Q How does that work? Do you have to pay

Keepers, approximately?

A 2015.

Q Let's just start with 2012-- I know it's almost Thanksgiving and the year almost ended-- how often did you work?

A I would say Thursday, Friday, and Saturday. Sometimes a Sunday.

Q Five days a week?

A I would say 4.

Q In 2012?

A Yes.

Q And always the night shift?

A Yes.

Q And in 2012, 4 days a week, do you know how much you averaged? I know it varies. I get it.

Q I would say it would vary. Five hundred to twelve hundred.

A Dollars a week?

A Yes.

Q Now, in 2013, how often did you work?

A I would say like the same amount of time.

Q About 4 days?

PARTIES TO APPEAL

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